No. 20-____

IN THE

Supreme Court of the United States

GRUPO CEMENTOS DE CHIHUAHUA S.A.B. DE C.V.,
GCC LATINOAMÉRICA, S.A. DE C.V.,

Petitioners,

v.

COMPAÑÍA DE INVERSIONES MERCANTILES, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In cases where the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 ("Hague Service Convention") applies, it "provide[s] the exclusive means of valid service." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). The means of service stated in the Hague Service Convention do not include service by email. In the decision below, however, the Tenth Circuit approved service by email on the U.S. counsel of foreign defendants. It also held that personal jurisdiction was satisfied because the U.S. contacts—even if they were not the actual cause of the plaintiff's claim—formed part of the "narrative" of the case.

The questions presented are:

1. Does service by email on the U.S. counsel of a foreign party pursuant to Federal Rule of Civil Procedure 4(f)(3) violate the Hague Service Convention?

2. Does a case satisfy the "arising out of" test for personal jurisdiction merely because meetings in the United States were part of the "narrative" of the case, notwithstanding that the governing contract was formed and the alleged breach occurred outside the United States?

PARTIES TO THE PROCEEDING BELOW

Petitioner Grupo Cementos de Chihuahua, S.A.B. de C.V. was a defendant-appellant below.

Petitioner GCC Latinoamérica, S.A. de C.V. was a defendant-appellant below.

Respondent Compañía de Inversiones Mercantiles, S.A. was a plaintiff-appellee below.

RULE 29.6 STATEMENT

Grupo Cementos de Chihuahua S.A.B. de C.V. has no parent corporation, and CAMCEM, S.A. de C.V. owns more than 10% of its stock. CAMCEM, S.A. de C.V. is owned by Promotora de Proyectos Proval, S.A. de C.V. and Cemex S.A.B. de C.V., a publicly held corporation.

GCC Latinoamérica, S.A. de C.V. is a subsidiary of Grupo Cementos de Chihuahua S.A.B. de C.V. and no publicly held corporation owns more than 10% of its stock.

RELATED PROCEEDINGS

United States District Court (D. Colo.):

Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua, S.A.B. de C.V., et al., No. 1:15-CV-02120-JLK (Mar. 26, 2019).

United States Court of Appeals (10th Cir.):

Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua, S.A.B. de C.V., et al., No. 19-1151 (Aug. 17, 2020).

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INTRODUCTION

In this case, Plaintiff Compañía de Inversiones Mercantiles, S.A. ("CIMSA") failed to serve its complaint on Defendants Grupo Cementos de Chihuahua, S.A.B. de C.V. and GCC Latinoamérica, S.A. de C.V. (together, "GCC"), two Mexican companies, in accordance with the Hague Service Convention. The Tenth Circuit held that CIMSA nonetheless properly served GCC—and could evade the detailed methods of service prescribed by the Hague Service Convention—simply by sending an email with the complaint to GCC's U.S. counsel. The Tenth Circuit further held that it had specific personal jurisdiction over GCC based on U.S. contacts that predated the alleged breach of contract, on the theory that those U.S. contacts supposedly had "some causal relationship" to, and "form part of the narrative" of, the case.

This Court should grant certiorari to decide whether email service under Federal Rule of Civil Procedure 4(f)(3) violates the Hague Service Convention. In the alternative, the Court should hold this petition and grant certiorari, vacate the judgment, and remand in light of the Court's forthcoming decision on personal jurisdiction in *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368 (S. Ct.); *Ford Motor Co. v. Bandemer*, No. 19-369 (S. Ct.) (together, "*Ford Motor*").

On the service-by-email question, there is a deep and entrenched split of authority, with over a dozen district court cases holding that email service violates the Hague Service Convention and several dozen more taking the opposite view. This Court should not await further percolation in the courts of appeals given the enormous number of district court opinions and the rarity with which courts of appeals reach the issue

(typically only in cases where email service is upheld, as opposed to where it is deemed inadequate, thereby prompting compliant service abroad). Moreover, there is a substantial harm in waiting—as an international treaty is being trampled while dozens of cases are barreling forward with proceedings that stand to be voided to the extent service may later be deemed improper.

Ultimate voiding is very likely because the email service approved by the Tenth Circuit and dozens of district courts breaks from this Court's precedents. In particular, this Court has held that, where the Hague Service Convention applies, it provides the "exclusive" method of service and "pre-empts" other methods of service. *Volkswagenwerk*, 486 U.S. at 699, 706; *see also Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017). Because the Hague Service Convention does not list email as an acceptable means of service, it is prohibited. Indeed, the courts and commentators examining this issue have recognized this straightforward logic and have criticized the lack of analysis in decisions like the one below.

On the personal-jurisdiction question, the decision in *Ford Motor* likely will require a GVR here. Whatever the precise outcome in *Ford Motor*, the Court is very unlikely to adopt the Tenth Circuit's standard, under which forum contacts suffice so long as they are "part of the narrative" of the case. App. 30a. In addition, the Tenth Circuit stated that it confronted a "close question" on personal jurisdiction and specifically noted the need for this Court's guidance on the proper standard for determining when a claim "aris[es] out of" forum contacts. App. 27a. Accordingly, this Court should afford the Tenth Circuit the opportunity to reconsider its opinion with the benefit of this Court's forthcoming guidance.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit is reported at 970 F.3d 1269 and reproduced at App. 1a-55a.

JURISDICTION

The court of appeals issued its opinion on August 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY AND RULES PROVISIONS INVOLVED

The relevant provisions of the Hague Service Convention are as follows:

> The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. ...

Hague Service Convention, art. 1.

> Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6. ...

Id., art. 2.

> Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Id., art. 14.

The relevant provisions of the Federal Rules of Civil Procedure are as follows:

> (f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> . . .
>
> (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f).

STATEMENT

A. The Alleged Breach Of Contract

CIMSA is a Bolivian corporation, with its principal place of business in Bolivia. App. 57a. GCC are Mexican corporations based in Chihuahua, Mexico. *Id.*

GCC and CIMSA conducted extensive, in-person negotiations and due diligence regarding GCC's purchase of shares of Sociedad Boliviana de Cemento, S.A. ("SOBOCE"), a cement company that operates in Bolivia. App. 5a. These meetings occurred almost entirely in Bolivia and Mexico; only one preliminary meeting occurred in Florida, at which no agreement was reached and no negotiations were conducted over any terms. App. 57a-58a.

GCC and CIMSA entered into a shareholder agreement in Bolivia, whereby GCC acquired a 47% interest in SOBOCE, and CIMSA would have a right of first refusal if GCC sold these shares. App. 98a. GCC and CIMSA also agreed that all disputes arising out of the

agreement would be subject to arbitration in Bolivia under Bolivian law. App. 99a.

A dispute later arose regarding GCC's sale of its shares in SOBOCE to a Peruvian cement company, Consorcio Cementero del Sur, S.A. ("CCS"). App. 59a. CIMSA claimed that this sale violated its right of first refusal. App. 60a.

B. The Arbitration In Bolivia

Pursuant to the shareholder agreement, CIMSA began arbitration proceedings in Bolivia under Bolivian law. App. 7a. The arbitral tribunal issued an award finding GCC liable to CIMSA. (App. 8a) and a second award concluding that damages were US$36,139,223 plus interest (App. 60a).

C. The District Court Proceedings

CIMSA brought a petition in district court to confirm the arbitral award, *id.*, but failed to effect service of process upon GCC through the Hague Service Convention, App. 12a-13a. CIMSA sought an order authorizing alternative service, and the district court granted this motion, authorizing service on GCC through its U.S. counsel, App. 13a. The district court did not address the legal basis for allowing email service, but ruled:

> [I]t is clear that Respondents are on notice of these proceedings and are in regular contact with counsel. They have submitted multiple briefs and other filings, yet refuse to waive service or authorize their counsel to accept service. I will not abide Respondents' irksome and peevish attempts to frustrate service unnecessarily while they actively participate in the present litigation. Therefore, I find

> that service of Respondents through their U.S. counsel, Cleary Gottlieb and/or general counsel Sergio Saenz, by e-mail will comport with due process.

App. 121a.

The district court denied GCC's motion to dismiss CIMSA's petition on personal-jurisdiction grounds. App. 96a-118a. Although Colorado lacked personal jurisdiction over GCC, the court held that Federal Rule of Civil Procedure 4(k)(2) authorized it to consider GCC's nationwide contacts. App. 103a & n.4. It then exercised jurisdiction over GCC based on three U.S. contacts: (1) meetings in Miami where GCC negotiated a failed agreement with CIMSA to purchase the SOBOCE shares; (2) one meeting in Houston where CIMSA proposed terms for the SOBOCE purchase that GCC rejected; and (3) GCC's hiring of U.S.-based attorneys. App. 109a-110a. The court ruled that it did not matter whether the U.S. contacts were relevant to the claim for confirmation of the arbitral award because requiring such a link would "frustrate the primary purpose of the [New York] Convention." App. 111a.

D. The Court Of Appeals Decision

The Tenth Circuit (Briscoe, J., joined by Ebel and Lucero, JJ.) affirmed. The court held that CIMSA properly served defendants by email to GCC's U.S. counsel. App. 39a-43a. The court acknowledged that "the Hague Service Convention does not authorize service methods beyond the use of [Mexico's] central authority." App. 42a. Yet it nonetheless held that "the relevant inquiry under Rule 4(f)(3) is not whether the agreement affirmatively endorses service outside the central authority," but "whether the alternative service method in question is 'prohibited' by the agreement."

Id. (quoting Fed. R. Civ. P. 4(f)(3)). And it relied on "[s]everal tribunals" ruling that the Hague Service Convention "does not contain a specific prohibition on this form of service." *Id.* It further held that service complied with Rule 4(f)(3) because an email sent to U.S. counsel, to give notice to a foreign party, constitutes service "'at a place not within any judicial district of the United States.'" App. 44a (quoting Fed. R. Civ. P. 4(f)).

The Tenth Circuit also found personal jurisdiction satisfied, holding there was specific jurisdiction over GCC. The court began by holding that there need only be a connection to the breach-of-contract claim underlying the Bolivian arbitration, rather than a connection to the sole claim in U.S. court: the claim for enforcement of the Bolivian arbitral award. App. 24a-27a. As to the breach-of-contract claim, the Tenth Circuit recognized that it was a "close question" whether the U.S. contacts here were sufficiently connected to the case. App. 27a. It also noted that this Court "has not yet explained the scope of the 'arising out of' requirement." *Id.* (quotation marks omitted). The court focused on meetings in the United States that predated the alleged breach of CIMSA's right of first refusal. App. 29a-30a. And it held that "GCC's American contacts bear at least some causal relationship with CIMSA's injury, even if CIMSA's loss was not proximately caused in a tort sense by GCC's activities in the United States." App. 29a. The court concluded that it sufficed for personal jurisdiction that the U.S. contacts "form part of the narrative determining when and how GCC's breach occurred." App. 30a.

After the Tenth Circuit decision at issue here, the Bolivian courts vacated the damages portion of the arbitral award, and, on November 20, 2020, GCC filed

a Rule 60(b) motion to vacate the judgment, which motion is pending in the district court.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to address the Tenth Circuit's decision to allow email service to circumvent the requirements of the Hague Service Convention and, in the alternative, this Court should GVR the Tenth Circuit's personal jurisdiction decision in light of *Ford Motor*.

I. There is an enormous and ever-growing split of authority on whether email service on a foreign party under Rule 4(f)(3) violates the Hague Service Convention. There are at least a dozen district courts that have prohibited such email service, and at least three dozen others that have allowed it. In the last year alone, over twenty courts have addressed the issue, and they continue to divide on the outcome.

The Tenth Circuit's decision to allow email service conflicts with this Court's holding that the Hague Service Convention's methods of service are "exclusive" and "pre-empt[ive]." *Volkswagenwerk*, 486 U.S. at 699, 706. The Tenth Circuit, along with the dozens of district courts allowing email service, fail to confront this Court's precedents. Instead, they simply cite other cases, all stemming from the same foundational error in over-reading an old Ninth Circuit case that did not at all concern the Hague Service Convention. The result is a body of case law that springs from imagined foundations but is nonetheless spawning a very real explosion of email service across the country—all in defiance of the Hague Service Convention. And to the extent that courts attempt to justify email service, they rely on the claim that Rule 4(f)(3) somehow

trumps the Hague Service Convention, a conclusion that is misconceived.

This case affords an ideal vehicle to address the issue. The district court and court of appeals squarely decided the question of email service. The particular context here is an especially common means for district courts to evade the Hague Service Convention—*i.e.*, allowing email service on U.S. counsel. This context is also especially problematic, as it effectively punishes foreign companies for hiring U.S. counsel to contest service by allowing service on that counsel to substitute for proper service under the Hague Service Convention.

This issue is worthy of this Court's review, and this Court should not await further circuit court decisions on the issue. The sheer number of cases on the issue is staggering, yet the issue rarely reaches the courts of appeals. Moreover, when it does reach the court of appeals, it typically does so in cases where email service is being authorized (because otherwise a plaintiff will have simply turned to an authorized mode of service abroad), and where ultimate appeal to this Court (following an adverse final judgment) is remote. Accordingly, if certiorari is not granted in this case, it may be many more years until the issue returns to this Court. In the interim, dozens of cases will proceed under the mistaken view that email service can circumvent the Hague Service Convention. All of the proceedings in those cases may become void for lack of jurisdiction in the event that view is later rejected. As such, it would benefit courts and parties across the country—as well as international relations and the interests of foreign sovereigns around the world—for this Court to decide now whether email service is permissible.

II. In the alternative, if this Court does not grant certiorari on the first question presented, it should hold the petition and GVR in light of *Ford Motor*. The Tenth Circuit's decision on personal jurisdiction addressed the same issue this Court is considering in *Ford Motor*: the proper standard for determining whether the forum contacts are sufficiently connected to the case for specific personal jurisdiction. In considering this issue, the court openly acknowledged the need for this Court's guidance on the correct standard, and did so in what even it deemed a "close question" on personal jurisdiction. App. 27a. The court also recognized that the forum contacts asserted here were connected only to the underlying claim in the Bolivian arbitration, not to the claim in the United States for enforcement of the arbitral award. The court further held that, even for the underlying claim for breach of contract, it sufficed that the forum contacts formed "part of the narrative" of the case, even if they did not actually cause the breach. App. 30a. Given the uniqueness of the Tenth Circuit's standard, the closeness of the case, and the Tenth Circuit's statement that this Court had not yet provided guidance on the issue, it is very likely that *Ford Motor*'s analysis will call into question the Tenth Circuit's reasoning and will therefore warrant a GVR.

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE LOWER COURTS OVER WHETHER EMAIL SERVICE ON A FOREIGN PARTY UNDER RULE 4(f)(3) VIOLATES THE HAGUE SERVICE CONVENTION

A. There Is A Widespread Division Of Authority On This Issue

District courts across the country are intractably divided on the question whether email service is proper under the Hague Service Convention. Courts and commentators consistently recognize this split of authority. *See, e.g.*, *Luxottica Grp. S.p.A. v. Partnerships & Unincorporated Ass'ns Identified on Schedule "A"*, 391 F. Supp. 3d 816, 822 (N.D. Ill. 2019), *reconsideration denied in part*, No. 18-cv-02188, 2019 WL 2357011 (N.D. Ill. June 4, 2019) ("Federal trial courts have divided over whether the Convention limits their authority to authorize service of process by email."); *Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co.*, No. 19-cv-01167-JST, 2020 WL 5036085, at *5-6 (N.D. Cal. Aug. 19, 2020) (similar); *see also* Michael A. Rosenhouse, Annotation, *Permissibility of Effectuating Service of Process by Email Between Parties to Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 14 A.L.R. Fed. 3d Art. 8 (2016) ("A split of authority has developed concerning whether service by email is permissible under the Hague Convention and the Federal Rules."); Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 998-1003 (2017) (discussing the split).

At least a dozen courts have recognized that email service is improper because the methods of service the Hague Service Convention allows are exclusive, and

email service is not among the listed methods. *See, e.g.*, *Luxottica*, 391 F. Supp. 3d at 827 ("Because email would bypass the methods of service the Hague Convention authorizes, the Convention preempts it as inconsistent."); *Facebook*, 2020 WL 5036085, at *8 ("Service by e-mail on defendants in China is not one of the Hague Service Convention's approved methods of service. Thus, unless an exception to the Convention applies, service by e-mail on the China-based defendants in question here cannot be authorized under Rule 4(f)(3)."); *Anova Applied Elecs., Inc. v. Hong King Grp., Ltd.*, 334 F.R.D. 465, 471-72 (D. Mass. 2020) ("Rule 4(f)(3) does not permit e-mail service on defendants . . . .").[1]

Nonetheless, the majority position is that email service *is* permitted under Rule 4(f)(3) *despite* the express limitations set forth in the Hague Service Convention. As one court noted, "courts routinely direct service on an international defendant's counsel under Rule 4(f)(3)." *WorldVentures Holdings, LLC v.*

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[1] *See also, e.g.*, *Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2021 WL 86767, at *15 (D. Ariz. Jan. 11, 2021); *Prem Sales, LLC v. Guangdong Chigo Heating*, No. 20-CV-141-M-BQ, 2020 WL 6063452, at *9 (N.D. Tex. Oct. 14, 2020); *Habas Sinai Ve Tibbi Gazlar Istihsal A.S. v. Int'l Tech. & Knowledge Co.*, No. 19-cv-00608-PLD, 2019 WL 7049504, at *3 (W.D. Pa. Dec. 23, 2019); *Midmark Corp. v. Janak Healthcare Private Ltd.*, No. 14-cv-088, 2014 WL 1764704, at *3 (S.D. Ohio May 1, 2014); *Elobeid v. Baylock*, 299 F.R.D. 105, 108 (E.D. Pa. 2014); *Compass Bank v. Katz*, 287 F.R.D. 392, 395 (S.D. Tex. 2012); *Mapping Your Future, Inc. v. Mapping Your Future Servs., Ltd.*, 266 F.R.D. 305, 308 (D.S.D. 2009); *Agha v. Jacobs*, No. 07-civ-01800-RMW, 2008 WL 2051061 (N.D. Cal. May 13, 2008); *CRS Recovery, Inc. v. Laxton*, No. 06-cv-7093-CW, 2008 WL 11383537, at *1-2 (N.D. Cal. Jan. 8, 2008). One state supreme court has taken the same view. *See Cardona v. Kreamer*, 235 P.3d 1026, 1030 (Ariz. 2010) ("When the Convention applies, alternative service in Mexico through postal channels and email is prohibited, and the superior court erred in ruling otherwise.").

Mavie, No. 18-cv-00393-ALM-KPJ, 2018 WL 6523306, at *14 (E.D. Tex. Dec. 12, 2018). Dozens of courts have taken this position over the last decade.[2]

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[2] *Rubie's Costume Co., Inc. v. Yiwu Hua Hao Toys Co.*, No. 18-cv-01530-RAJ, 2019 WL 6310564, at *3 (W.D. Wash. Nov. 25, 2019); *Gamboa v. Ford Motor Co.*, 414 F. Supp. 3d 1035, 1042 (E.D. Mich. 2019), *opinion modified on reconsideration*, No. 18-cv-10106-DPH-EAS, 2019 WL 8378038 (E.D. Mich. Nov. 15, 2019); *Fourte Int'l Ltd. BVI v. Pin Shine Indus. Co.*, No. 18-cv-00297-BAS-BGS, 2019 WL 246562, at *2-3 (S.D. Cal. Jan. 17, 2019); *Angiodynamics, Inc. v. Neuberger*, No. 18-cv-30092, 2018 WL 5792321, at *1 (D. Mass. Nov. 5, 2018); *Keck v. Alibaba.com, Inc.*, No. 17-cv-05672-BLF, 2018 WL 3632160, at *3-4 (N.D. Cal. July 31, 2018); *Kipu Sys., LLC v. ZenCharts, LLC*, No. 17-cv-24733, 2018 WL 8264634, at *2 (S.D. Fla. Mar. 29, 2018); *Jackson Lab. v. Nanjing Univ.*, No. 17-cv-00363-GZS, 2018 WL 615667, at *4 (D. Me. Jan. 29, 2018); *Phoenix Process Equip. Co. v. Capital Equip. & Trading Corp.*, 250 F. Supp. 3d 296, 308 (W.D. Ky. 2017); *Microsoft Corp. v. Goldah.com Network Tech. Co.*, No. 17-cv-02896-LHK, 2017 WL 4536417, at *4 (N.D. Cal., Oct. 11, 2017); *Microsoft Corp. v. Gameest Int'l Network Sales Co.*, No. 17-cv-02883-LHK, 2017 WL 4517103, at *2-3 (N.D. Cal. Oct. 10, 2017); *Codigo Music, LLC v. Televisa S.A.*, No. 15-cv-21737, 2017 WL 4346968, at *7 (S.D. Fla. Sept. 29, 2017); *Seaboard Marine Ltd., Inc. v. Magnum Freight Corp.*, No. 17-cv-21815, 2017 WL 7796153, at *2 (S.D. Fla. Sept. 21, 2017); *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, No. 06-cv-06572-JSW, 2007 WL 1140639, at *2 (N.D. Cal. Apr. 17, 2017); *Juicero, Inc. v. Itaste Co.*, No. 17-cv-01921-BLF, 2017 WL 3996196, at *3 (N.D. Cal. June 5, 2017); *Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 13-16 (D.D.C. 2016); *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. 09-cv-02047, 2015 WL 13387769, at *4 (E.D. La. Nov. 9, 2015); *United States v. Besneli*, 2015 WL 4755533, at *2 (S.D.N.Y. Aug. 12, 2015); *MultiFab, Inc. v. ArlanaGreen.com*, No. 15-cv-0066-SMJ, 2015 WL 12880504, at *3-4 (E.D. Wash., Mar. 13, 2015); *Magpul Indus. Corp. v. Zejun*, No. 14-cv-01556-JSW, 2014 WL 7213344, at *2 (N.D. Cal. Dec. 16, 2014); *Affinity Labs of Texas, LLC v. Nissan N. Am., Inc.*, No. 13-cv-369, 2014 WL 11342502, at *1-*4 (W.D. Tex. July 2, 2014); *Midmark Corp. v.*

In the last year, courts have accelerated this trend, now frequently approving service by email notwithstanding several recent decisions, listed above, criticizing this case law. *See, e.g.*, *Terrestrial Comms LLC v. NEC Corp.*, No. 20-cv-00096-ADA, 2020 WL 3452989, at *3 (W.D. Tex. June 24, 2020) ("District courts routinely direct service on an international defendant's counsel under Rule 4(f)(3) even if the counsel has not been expressly authorized to accept service on the defendant's behalf.").[3]

Janak Healthcare Private Ltd., No. 14-cv-088, 2014 WL 1764704, at *2 (S.D. Ohio May 1, 2014); *F.T.C. v. PCCare247 Inc.*, No. 12-cv-7189-PAE, 2013 WL 841037, at *2-4 (S.D.N.Y. Mar. 7, 2013); *Henry F. Teichmann, Inc. v. Caspian Flat Glass OJSC*, No. 13-cv-458, 2013 WL 1644808, at *1-2 (W.D. Pa. Apr. 16, 2013); *RPost Holdings, Inc. v. Kagan*, No. 11-cv-238-JRG, 2012 WL 194388, at *2-3 (E.D. Tex. Jan. 23, 2012); *Russell Brands, LLC v. GVD Int'l Trading, SA*, 282 F.R.D. 21, 26 (D. Mass. 2012); *Gucci Am., Inc. v. Wang Huowing*, No. 09-cv-05969-JCS, 2011 WL 31191, at *3 (N.D. Cal. Jan. 3, 2011), *report and recommendation adopted*, 09-cv-05969-CRB, 2011 WL 30972 (N.D. Cal. Jan. 5, 2011); *Knit With v. Knitting Fever, Inc.*, Nos. 08-cv-4221, 08-cv-4775, 2010 WL 4977944, at *4-5 (E.D. Pa. Dec. 7, 2010); *Chanel, Inc. v. Lin*, No. 09-cv-04996-JCS, 2010 WL 2557503, at *3 n.3 (N.D. Cal. May 7, 2010), *report and recommendation adopted*, No. 09-cv-04996-SI, 2010 WL 2557561 (N.D. Cal. June 21, 2010).

[3] *See also Reflex Media, Inc. v. Richard Easton Ltd.*, No. 2:20-cv-00051-GMN-EJY, 2021 WL 24687, at *1 (D. Nev. Jan. 4, 2021);*Document Operations LLC v. AOS Legal Techs.,* No. 20-cv-1532, 2020 WL 6685488, at *3-5 (S.D. Tex. Nov. 12, 2020); *The Neck Hammock, Inc v. Danezen.com*, No. 20-cv-287-DAK-DBP, 2020 WL 6364598, at *4-5 (D. Utah Oct. 29, 2020); *Magma Holding, Inc. v. Ka Tat "Karter" Au-Yeung*, No. 20-cv-00406-RFB-BNW, 2020 WL 5877821, at *4-5 (D. Nev. Oct. 2, 2020); *Richemont Int'l SA v. montblanchot.com*, No. 20-cv-61941, 2020 WL 5763931, at *2 (S.D. Fla. Sept. 28, 2020); *Hardin v. Tron Found.*, No. 20-cv-2804-VSB, 2020 WL 5236941, at *1-2 (S.D.N.Y. Sept. 1, 2020); *Cunningham v. Gen. Motors LLC*, No. 20-cv-3097-

B. Decisions Allowing Service By Email Conflict With This Court's Precedents

1. This Court's precedents, holding that the Hague Service Convention's methods of service are exclusive, refute the numerous courts allowing service by email on foreign defendants. As this Court has explained, the Hague Service Convention "requires each state to establish a central authority to receive requests for service of documents from other countries," and that central authority "serve[s] the documents by a method prescribed by," or compatible with, "the internal law of the receiving state." *Volkswagenwerk*, 486 U.S. at 698-99 (discussing Articles 2 and 5). If "the forum's internal law require[s] transmittal of documents for service abroad," then "the Convention therefore provide[s] the *exclusive* means of valid service." *Id.* at 706 (emphasis added). In short, "the Hague Service Convention specifies certain approved methods of service and 'pre-empts inconsistent methods of service' wherever it applies." *Water Splash*, 137 S. Ct. at 1507 (quoting *Volkswagenwerk*, 486 U.S. at 699); *see also Volkswagenwerk*, 486 U.S. at 699 ("the Convention pre-empts inconsistent methods of service . . . *in all cases* to which it applies" (emphasis added)); *id.* at 703 (holding that the Hague Service Convention eliminated "*notification au parquet*" by not including it as

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AKH, 2020 WL 4748157, at *1 (S.D.N.Y. Aug. 17, 2020); *In re Bibox Grp. Holdings Ltd. Sec. Litig.*, No. 20-cv-2807-DLC, 2020 WL 4586819, at *3 (S.D.N.Y. Aug. 10, 2020); *Rang Dong Joint Stock Co. v. J.F. Hillebrand USA, Inc.*, No. 18-cv-003195-KJM-KJN, 2020 WL 3841185, at *9 (E.D. Cal. July 8, 2020); *Commodity Futures Trading Comm'n v. Fingerhut*, No. 20-cv-21887, 2020 WL 4499198, at *1-2 (S.D. Fla. May 29, 2020); *SEC v. de Nicolas Gutierrez*, No. 17-cv-2086-JAH-JLB, 2020 WL 1307143, at *2-3 (S.D. Cal. Mar. 19, 2020).

an approved method of service).[4] Indeed, the inquiry in *Water Splash*—whether Article 10 of the Hague Service Convention permitted service by mail—would have been superfluous if service by mail were allowed *regardless* of whether the Hague Service Convention permitted it. 137 S. Ct. at 1507.

It is undisputed that the Hague Service Convention does not permit service by email. Because the Hague Service Convention's methods of service are exclusive and preempt inconsistent methods of service, as this Court has held, service by email is necessarily improper in any case governed by the Hague Service Convention. The courts that have examined *Volkswagenwerk* have all agreed in following this inexorable reasoning. *See, e.g.*, *Luxottica*, 391 F. Supp. 3d at 827; *Facebook*, 2020 WL 5036085, at *8. Likewise, many commentators have recognized the same. *See, e.g.*, Gardner, *supra*, at 998-1001; *N.D. Cal Gets It Right*, Hague Law Blog, https://www.haguelawblog.com/2020/08/n-d-cal-gets-it-right (Aug. 13, 2020) ("It's *not* easy to understand why courts have concluded that Hague methods aren't exclusive—it's utterly baffling in light of [*Volkswagenwerk v.*] *Schlunk* . . . ." (emphasis in original)); Theodore J. Folkman, *Gurung v. Malhotra Is Wrongly Decided* (manuscript at 12), https://papers.ssrn.com/sol3/pap

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[4] Similarly, the U.S. State Department has explained that "service through the Mexico Central Authority is the exclusive method available." U.S. Department of State—Bureau of Consular Affairs, "Judicial Assistance Country Information: Mexico," *available at* https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Mexico.html (last updated Oct. 19, 2017) (https://perma.cc/PL33-TGE3). This follows from the well-settled principle that a treaty must first be construed based on its "ordinary meaning." Vienna Convention on the Law of Treaties, 1155 U. N. T. S. 331, T. S. No. 58 (1980), 8 I. L. M. 679 (1969) ("Vienna Convention"), art. 31.1.

ers.cfm?abstract_id=2370078 ("Because the Hague Service Convention is exclusive . . . , it is clear that *Gurung* and the cases that have followed it are wrongly decided.").

2. The reasoning of the courts permitting email service is often nonexistent. Instead, the cases simply cite each other, all going back to a simple error in relying upon a Ninth Circuit case, *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002). *See Facebook*, 2020 WL 5036085, at *6 ("A reason for the tilt in the opposite direction is an overly broad reading of *Rio Properties* . . . ."); *see also* Gardner, *supra*, at 999-1001 (noting the reliance in the case law on *Rio Properties*). While *Rio Properties* has some broad language about the authority to allow email service, it did not and had no reason to consider the potential conflict with the Hague Service Convention: "the Hague Convention does not apply in this case because Costa Rica is not a signatory." *Rio Props.*, 284 F.3d at 1015 n.4. As such, the many courts that directly or indirectly rely upon *Rio Properties* wind up whistling past what should be the dispositive issue: the ostensible conflict with the Hague Service Convention.

More recently, several courts have erred in relying upon *Nagravision SA v. Gotech International Technology Ltd.*, 882 F.3d 494, 498 (5th Cir. 2018). *See, e.g.*, *Gamboa*, 414 F. Supp. 3d at 1039; *WorldVentures*, 2018 WL 6523306, at *13 n.26. In *Nagravision*, the Fifth Circuit stated in a single sentence of analysis that "the Hague Convention . . . does not displace Rule 4(f)(3)." *Id.* at 498. In the sole case that *Nagravision* relied upon, however, the address of the party to be served was unknown, so the Hague Service Convention did not apply at all. *See United States v. Real Prop. Known As 200 Acres of Land Near FM 2686 Rio*

Grande City, Tex., 773 F.3d 654, 660 (5th Cir. 2014); *see also* Hague Service Convention, art. 1 ("This Convention shall not apply where the address of the person to be served with the document is not known."). In that posture, *Nagravision* had no occasion to address this Court's precedents addressing the exclusivity of service methods under the Hague Service Convention; the upshot has misled other courts to cite *Nagravision* as always blessing email service without needing to grapple with the Hague Service Convention. Notably, one district court within the Fifth Circuit correctly held that email service was improper, and that "*Nagravision* does not stand for the general proposition that email service on a [foreign] defendant is permitted under the Convention," because service in *Nagravision* was proper under the Hague Service Convention. *Prem Sales*, 2020 WL 6063452, at *5-6.

Indeed, the Tenth Circuit's opinion here is a perfect example of how courts are blindly following each other in allowing email service, rather than considering whether email service is effectively prohibited by the Hague Service Convention, when properly read in the light of this Court's precedents. The Tenth Circuit stated simply: "Several tribunals have held . . . that the Convention does not contain a specific prohibition on this form of service." App. 42a. Under *Volkswagenwerk* and *Water Splash*, however, there is no need for a "specific prohibition" because the methods of service the Hague Service Convention permits are exclusive, by definition and by design. Moreover, the cases the Tenth Circuit cited (App. 42a-43a) likewise said little on the issue, beyond simply overreading *Rio Properties*. *See de Nicolas Gutierrez*, 2020 WL 1307143, at *1, *3; *FTC v. Repair All PC, LLC*, No. 1:17-cv-00869-DAP, 2017 WL 2362946, at *3-4 (N.D. Ohio May 31, 2017); *Carrico v. Samsung*

Elecs. Co., No. 15-cv-02087-DMR, 2016 WL 2654392, at *3-4 (N.D. Cal. May 10, 2016); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014); *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 5:11-cv-02460-LHK, 2011 WL 2607158, at *11-13 (N.D. Cal. July 1, 2011).

3. To the extent that the courts allowing email service have provided some justification for their position, their reasoning is misconceived. *First*, some courts have relied on the theory that Rule 4(f)(3) somehow supersedes the Hague Service Convention and that this Court's holding as to the exclusivity of the Hague Service Convention was mere dicta.[5] But no legal principle authorizes the Federal Rules of Civil Procedure to render inoperative the provisions of a duly-enacted treaty. *See, e.g.*, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (holding that the authority exercised in the Federal Rules of Civil Procedure is "to make rules not inconsistent with the statutes or Constitution of the United States"); Vienna Convention,

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[5] *See, e.g.*, *Richmond*, 2011 WL 2607158, at *12 ("Although the Supreme Court has stated, in dicta, that 'compliance with the Convention is mandatory in all cases to which it applies,' it has not provided clear guidance as to how the requirements of the Hague Convention interact with a court's authority to order alternative service under Rule 4(f)(3).") (quoting *Volkswagenwerk*, 486 U.S. at 705); *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 9:20-md-02924-RLR, 2020 WL 5501141, at *1 (S.D. Fla. Sept. 11, 2020) ("While 'compliance with the Convention is mandatory in all cases to which it applies,' the Court is permitted to order alternate means of service as long as the signatory nation has not expressly objected to those means.") (quoting *Volkswagenwerk*, 486 U.S. at 705); *Fingerhut*, 2020 WL 4499198, at *1-2 ("While 'compliance with the Convention is mandatory in all cases to which it applies,' the Court is permitted to order alternate means of service as long as the signatory nation has not expressly objected to those means.") (quoting *Volkswagenwerk*, 486 U.S. at 705).

art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). In any event, Rule 4(f)(3) by its terms does not purport to do any such thing: to the contrary, it permits service only "by other means *not prohibited by international agreement*." Fed. R. Civ. P. 4(f)(3) (emphasis added). In other words, where an international agreement (such as the Hague Service Convention) effectively prohibits a particular method of service, Rule 4(f)(3) by its own terms does not permit that method. And as this Court held in *Volkswagenwerk*—in language that is not dicta but fundamental to the decision—the Hague Service Convention's methods of service are exclusive and preemptive.

Second, some courts have held that, if the email is sent to an individual inside the United States, then the Hague Service Convention does not apply. *See, e.g.*, *Codigo Music*, 2017 WL 4346968, at *13. But the Tenth Circuit expressly and correctly rejected that notion, holding that the email constituted service outside the United States. App. 44a-45a. Regardless, this argument cannot support service in any case concerning Rule 4(f)(3) because that rule applies *only* to "serv[ice] at a place not within any judicial district of the United States." Fed. R. Civ. P. 4(f). Therefore, if service is deemed to have occurred within the United States, then Rule 4(f)(3), by its express terms, does not apply.[6] And if service is deemed to have occurred

[6] Where service is deemed to occur is a matter of domestic law even under the Hague Service Convention. *See Volkswagenwerk*, 486 U.S. at 707 ("Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications."); *see also* Gardner, *supra*, at 1001 ("If a court reaches Rule 4(f)(3), then, [*Volkswagenwerk v.*] *Schlunk*'s exception for domestic substituted service is inherently no longer relevant."). Accordingly,

outside the United States, then the Hague Service Convention does apply.

In short, Rule 4(f)(3) does not and cannot provide an end-run around the Hague Service Convention. *See Volkswagenwerk*, 486 U.S. at 705 ("[W]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad."). Moreover, in this case (like the majority of the cases discussed above), there was not even an argument that service on U.S. counsel was permissible under any law or rule other than Rule 4(f)(3).

C. This Case Is An Ideal Vehicle To Resolve The Conflict

Both the district court and the Tenth Circuit expressly decided that email service under Rule 4(f)(3) does not violate the Hague Service Convention. Because the Hague Service Convention does not permit email service in any situation, the question presented here—whether email service violates the Hague Service

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there is no sense in which service could be deemed within the United States for purposes of Rule 4(f)(3) yet outside the United States for purposes of the Hague Service Convention.

Notably, the cases the Tenth Circuit cited on this point (App. 44a-45a) generally concerned situations where the foreign nation was not a signatory to the Hague Service Convention or had renounced it. *See Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries (OPEC)*, 766 F.3d 74, 79 (D.C. Cir. 2014); *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1237-38 (Fed. Cir. 2010); *Rio Props.*, 284 F.3d at 1015 n.4; *see also Marks Law Offs., LLC v. Mireskandari*, 704 F. App'x 171, 177 (3d Cir. 2017) (authorizing service by mail, consistent with *Water Splash*).

Convention—is the same basic one on which the cases discussed above have hinged.[7]

Moreover, the particular situation here, where email service was made upon U.S. counsel, especially warrants this Court's review. Many of the cases in the split concern the exact same situation of email service on U.S. counsel under Rule 4(f)(3). *See, e.g.*, *Gonzalez*, 2021 WL 86767, at *15; *Marks Law Offs.*, 704 F. App'x at 177; *Bazarian*, 168 F. Supp. 3d at 17. Allowing not only email service, but such service on U.S. counsel, is especially troubling because it effectively punishes foreign defendants for hiring U.S. counsel to dispute service in forthright, respectful fashion. It is well established that a party does not consent to service merely by appearing to contest service.[8] Yet courts have been upending that cardinal rule by treating service upon U.S. counsel as sufficient; in essence,

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[7] A small number of cases deals with the question whether email constitutes a "postal channel[]" for which service is proper under Article 10 of the Hague Service Convention. In most cases, however, the foreign country has objected to Article 10 such that it does not apply. The same is true here, as Mexico has rejected Article 10. *See* App. 39a (citing Hague Conference on Private International Law ("HCCH") website, https://www. hcch.net/en/instruments/conventions/statustable/notifications/?csid=412&disp=resdn). That is why CIMSA has not argued—and the Tenth Circuit had no reason to consider—whether email is a postal channel.

[8] *See, e.g.*, *Grand Ent. Grp., Ltd. v. Star Media Sales Inc.*, 988 F.2d 476, 492 (3d Cir. 1993) ("Notice to a defendant that he has been sued does not cure defective service, and an appearance for the limited purpose of objecting to service does not waive the technicalities of the rule governing service."); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 n.7 (6th Cir. 1991) ("[A]s [the defendant's] first pleading specifically contested the insufficiency of service of process, it cannot be plausibly contended that he waived Rule 4's requirements and thereby submitted to the district court's jurisdiction.") (emphasis removed).

courts are using the challenge to service as the basis for service—even where, as here, U.S. counsel was retained specifically and solely to contest service. Such an abrogation of defendants' right to contest service (increasingly adopted by district courts across the country) cries out for this Court's review. *See Convergen Energy LLC v. Brooks*, No. 20-cv-03746-LJL, 2020 WL 4038353, at *8 (S.D.N.Y. July 17, 2020) ("The law should encourage foreign individuals and entities to consult with United States counsel about their obligations under United States law. There thus is a public value in allowing an individual who in good faith seeks such advice to obtain it without simultaneously and automatically appointing counsel as an agent for service of process or relieving any adversary of the otherwise applicable requirements for service of process.").

D. The Issue Should Be Addressed Now Given Its Frequency And Importance

The enormous, ever-increasing number of district court cases on this issue establishes its importance as well as why the Court should resolve it without pause. This Court's attention is especially warranted because the issue goes to jurisdiction, and thus to whether the cases should be proceeding at all. *See, e.g.*, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("[B]efore a court may exercise personal jurisdiction over a defendant," there must be "authorization for service of summons on the defendant.").

Further percolation in the courts of appeals is unnecessary and undesirable in these circumstances. There are already at least fifty district court cases on this issue, with at least twenty such cases in 2020 alone. Despite the frequency of district court cases, there are few court of appeals decisions on this issue and another may not arise for quite some time. The

reason is that decisions *denying* email service are *almost never* appealed, as the plaintiff instead simply pursues proper service under the Hague Service Convention. In contrast, decisions *allowing* email service are not appealable until after final judgment, which takes many years, if it happens at all in cases with foreign defendants. The result is that only one side of the split—the erroneous side—has been translating into court of appeals' precedent, while this Court has been starved of opportunity to correct an obvious, important, recurring error by district courts around the country.

Moreover, there is substantial harm in waiting. If the dozens of cases allowing email service under Rule 4(f)(3) are erroneous, then all of the proceedings in these cases may be voided for lack of jurisdiction. Given the enormous time and resources the parties and the courts typically spend on these cases, it would be far better for them to know sooner rather than later whether service was improper and the proceedings need to restart from scratch after proper service. Indeed, given that this issue now seems to be arising in district courts across the country at least once every few weeks, *see supra* at n.3, district courts should not be forced to guess whether email service is permissible and thereby put all future proceedings in jeopardy. That is especially true given, as discussed above, the clear conflict with this Court's precedents that district courts (and now the Tenth Circuit) simply ignore.

Further still, the interests of foreign sovereigns and orderly international relations are implicated by our courts' compliance with an international treaty. To the extent lower courts are giving short shrift to the specifications and limitations of the Hague Service

Convention relative to acceptable means of service abroad, that problem is worthy of this Court's solicitude.

II. IN THE ALTERNATIVE, THIS COURT SHOULD HOLD THE PETITION AND GVR IN LIGHT OF *FORD MOTOR*

While this Court should grant certiorari on the first question presented as going to the antecedent question of whether there was proper service, the Court should, failing such a grant, alternatively hold this petition and GVR on the second question presented. This Court's forthcoming decision in *Ford Motor* should only be expected to call into question the Tenth Circuit's reasoning below on personal jurisdiction. *See Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) ("A GVR is appropriate when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter.'") (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

This Court has now heard argument in *Ford Motor*, two consolidated cases concerning the proper test for determining whether the connection between forum contacts and the claim is sufficient for specific personal jurisdiction. The question presented in those cases is: "Whether the 'arise out of or relate to' requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts." Pet'r's Br. at i, *Ford Motor*, Nos. 19-368, 19-369 (S. Ct. Feb. 28, 2020).

Whatever the outcome in *Ford Motor*, it is very likely to affect the judgment here on personal jurisdiction. The Tenth Circuit expressly acknowledged the need for this Court's guidance, stating that "[t]he Supreme Court has not yet explained the scope of the 'arising out of' requirement." App. 27a (quotation marks omitted). In addition, the Tenth Circuit held that "it is a close question whether CIMSA's underlying claim arose out of GCC's nationwide contacts." *Id.* Accordingly, when this Court provides much-needed guidance on the "arising out of" standard, there is a substantial likelihood that any change or clarification of the causation test will affect the Tenth Circuit's decision on personal jurisdiction.

Furthermore, the Tenth Circuit concluded that GCC's nationwide contacts sufficed for personal jurisdiction based on aberrant reasoning that this Court is unlikely to adopt in *Ford Motor*.

First, the Tenth Circuit held that, while the U.S. contacts here did not constitute the supposed breach of contract, it sufficed that the U.S. contacts had "causative features" and "form part of the narrative determining when and how GCC's breach occurred," App. 30a; *see also* App. 29a-31a (holding it sufficed that there was "at least some causal relationship," App. 29a, but finding neither but-for nor proximate causation). Regardless of whether this Court adopts a but-for, proximate-cause, or some other standard, it is very unlikely to adopt the "part of the narrative" standard the Tenth Circuit adopted here. And whatever other standard this Court may choose, the Tenth Circuit should have the opportunity to apply that here.

Second, the Tenth Circuit held that it suffices for jurisdiction if "the litigation results from alleged *injuries*"—as opposed to claims—"that arise out of or

relate to activities by the defendant which were purposefully directed at the forum." App. 24a (quotation marks omitted). In reaching this conclusion, the Tenth Circuit reasoned that *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017), did not change the "jurisdictional landscape," and it therefore could look at the connection to the injury, rather than the specific claim for enforcement of the arbitral award. App. 24a. *But see Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue."). But if this Court holds in *Ford Motor*—as it did in *Bristol-Myers Squibb*—that there must be a connection between the forum contacts and the claim itself, then it would call into question the Tenth Circuit's contrary conclusion, thereby commending remand.

CONCLUSION

The Court should grant the petition for certiorari or, in the alternative, hold the petition and GVR in light of *Ford Motor*.

Respectfully submitted,

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January 14, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed August 17, 2020]

No. 19-1151

COMPAÑÍA DE INVERSIONES MERCANTILES, S.A.,

Plaintiff-Appellee,

v.

GRUPO CEMENTOS DE CHIHUAHUA S.A.B. DE C.V.;
GCC LATINOAMÉRICA, S.A. DE C.V.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-02120-JLK)

David M. Cooper, Quinn Emanuel Urquhart & Sullivan, LLP, New York, New York (Juan P. Morillo and Daniel Pulecio-Boek, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC, with him on the briefs), appearing for the Appellants.

Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP, New York, New York (Gabriel Hertzberg and Sylvi Sareva, Curtis, Mallet-Prevost, Colt & Mosle, LLP, New York, New York; and Michael A. Rollin, Fox Rothschild LLP, Denver, Colorado, with him on the brief), appearing for the Appellee.

Before BRISCOE, EBEL, and LUCERO, *Circuit Judges.*

BRISCOE, *Circuit Judge.*

This case involves a Bolivian company known as Compañia de Inversiones Mercantiles S.A. ("CIMSA") and Mexican companies known as Grupo Cementos de Chihuahua, S.A.B. de C.V. and GCC Latinoamerica, S.A. de C.V. (collectively "GCC"). Plaintiff - Appellant CIMSA brought a district court action in 2015 pursuant to the Federal Arbitration Act, 9 U.S.C. § 207, to confirm a foreign arbitral award issued in Bolivia against Defendant - Appellee GCC. The action has been prolonged by ongoing litigation abroad and obstacles to effectuating service. The underlying dispute arises out of an agreement under which CIMSA and GCC arranged to give each other a right of first refusal if either party decided to sell its shares in a Bolivian cement company known as Sociedad Boliviana de Cemento, S.A. ("SOBOCE"). GCC sold its SOBOCE shares to a third party after taking the position that CIMSA failed to properly exercise its right of first refusal. In 2011, CIMSA initiated an arbitration proceeding in Bolivia. The arbitration tribunal determined that GCC violated the contract and the parties' expectations. The arbitration tribunal later awarded CIMSA tens of millions of dollars for GCC's breach.

GCC initiated Bolivian and Mexican court actions challenging the arbitration tribunal's decisions. A Bolivian judge, holding a position similar to that of an American trial judge, rejected GCC's challenge to the arbitration tribunal's decision on the merits. A Bolivian court, acting in a capacity similar to that of an American intermediate appellate court, reversed and remanded. On remand, the matter was temporarily assigned to a different trial judge, who granted GCC's

request for relief before the original trial judge could return from a planned vacation. While these remand proceedings were occurring, however, Bolivia's highest court reversed the Bolivian appellate court and affirmed the original trial judge. But as a result of the simultaneous remand proceedings, Bolivia's highest court also issued arguably contradictory orders suggesting the second trial judge's ruling on the merits remained in effect. GCC filed a separate Bolivian court action challenging the arbitration tribunal's damages award. That case made its way to Bolivia's highest court as well, which reversed an intermediate appellate court's nullification of the award and remanded for further proceedings. The parties continue to litigate the damages award in Bolivia.

Invoking the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517, CIMSA filed a confirmation action in the United States District Court for the District of Colorado. After encountering difficulties with conventional service of process in Mexico under the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents (the "Hague Service Convention" or "Convention"), Nov. 15, 1965, 20 U.S.T. 361, CIMSA sought and received permission from the district court to serve GCC through its American counsel pursuant to Federal Rule of Civil Procedure ("Rule") 4(f)(3). The district court then rejected GCC's challenges to personal jurisdiction, holding (among other things) that (1) it was appropriate to aggregate GCC's contacts with the United States; (2) CIMSA's injury arose out of GCC's contacts; (3) exercising jurisdiction was consistent with fair play and substantial justice; and (4) alternative service was proper. The district court further rejected GCC's defenses to CIMSA's claim

under the New York Convention, concluding that (1) the arbitration tribunal's ruling on the merits had not been set aside by a competent Bolivian authority; and (2) the arbitration tribunal's ruling on damages was sufficiently "binding" to allow confirmation. These issues are now before us on appeal.

Although the jurisdictional questions are difficult, we consider this appeal pursuant to 28 U.S.C. § 1291 and affirm the district court. The district court appropriately aggregated GCC's contacts with the United States as a whole under Rule 4(k)(2). GCC forfeited arguments based on Rule 4(k)(2) and, regardless, we conclude that those arguments fall short on the merits. The district court properly determined that CIMSA's injury arose out of or related to GCC's nationwide contacts. Contacts concerning GCC's underlying breach of contract are pertinent, and those contacts satisfy the applicable version of the test for "proximate cause." The district court correctly decided that exercising personal jurisdiction over GCC comported with fair play and substantial justice because CIMSA established minimum contacts and GCC did not make a compelling case to the contrary. Last, the district court accurately concluded that substitute service on GCC's United States counsel did not run afoul of the Hague Service Convention or Rule 4(f)(3).

We also affirm the district court's confirmation of the arbitration tribunal's decisions. We agree with the district court that the best reading of the Bolivian proceedings is that the arbitration panel's merits award has not been set aside, because the Bolivian court orders supporting the second trial judge's decision favoring GCC lost any legal effect after Bolivia's highest court affirmed the initial trial judge's decision favoring CIMSA. In addition, the arbitration tribu-

nal's damages award may be confirmed in the United States under the New York Convention even if GCC's Bolivian judicial challenge remains pending. By necessity, we highlight in today's opinion some differences between the American judicial system and the Bolivian judicial system (and, at times, the Mexican judicial system). We note these differences only to place this case in context, not as a critique.

I. Background

CIMSA is a Bolivian company. Appellant's Appendix ("App.") at 130. GCC is a set of Mexican companies. *Id.* The relationship between CIMSA and GCC began no later than 2005, when the parties met in Miami to discuss a potential joint venture relating to SOBOCE. Appellee's Supplemental Appendix ("Supp. App.") at 6-7. SOBOCE is Bolivia's largest cement company. *Id.* at 6. After the Miami meeting, GCC made an offer to purchase a substantial interest in SOBOCE for approximately $59 million. *Id.* at 7. That offer was accepted and consummated a few months later, as GCC and CIMSA simultaneously entered into a shareholder agreement (the "2005 Shareholder Agreement"). *Id.* The 2005 Shareholder Agreement was governed by Bolivian law. App. at 561. GCC paid for the acquired SOBOCE shares (and later distributed SOBOCE dividends) through a San Francisco bank account. Supp. App. at 8. GCC's General Counsel is located in Colorado. *Id.* at 60.

Several years after the execution of the 2005 Shareholder Agreement, a disagreement arose between CIMSA and GCC involving a right of first refusal. The 2005 Shareholder Agreement enabled each party to transfer its shares in SOBOCE to a third party after a period of five years, provided that the transferring party gave notice and afforded the other party an

opportunity to purchase the shares on the same or better terms within 30 days. *Id.* at 8. In late 2009, after GCC signaled its intention to sell its SOBOCE shares at the end of the five-year holding period, CIMSA and GCC again met in Miami. *Id.* at 8-9. In early 2010, the parties met six more times in Miami, and the discussions included price, sales terms, valuation, and other features of a possible deal in which CIMSA would purchase GCC's SOBOCE shares. *Id.* at 9-10. The parties reached agreement on the fundamental terms of the sale during an April 2010 meeting in Miami, and signed an agreement (the "2010 Shareholder Agreement") in May 2010 in La Paz, Bolivia. *Id.* at 10. The transaction contemplated by the 2010 Shareholder Agreement did not close, however, because the Bolivian government expropriated a division of SOBOCE's business. *Id.*

In the wake of the expropriation, CIMSA and GCC began negotiating a new agreement. In mid-2011, the parties met in Houston, where CIMSA proposed two alternative payment structures. *Id.* at 10-11. In the weeks following the Houston meeting, the parties continued to discuss CIMSA's proposals via telephone and email. *Id.* at 11. In July 2011, GCC notified CIMSA that a Peruvian company had tendered a firm offer to buy GCC's SOBOCE shares. *Id.* CIMSA reiterated its willingness to purchase the shares, and requested a longer payment schedule than the one proposed by the Peruvian company. *Id.* GCC indicated that, assuming the parties could reach an agreement on all relevant terms, GCC would accept one of the payment terms proposed by CIMSA at the Houston meeting. *Id.*

By early August 2011, CIMSA and GCC had nearly finalized the terms of the new SOBOCE transaction.

Id. GCC instructed CIMSA to hire New York counsel to draft a final agreement. *Id.* CIMSA did so, and GCC hired its own New York counsel. *Id.* GCC sent CIMSA a draft purchase agreement (the "2011 Agreement") that was governed by New York law. *Id.* Right before the transaction was set to close, GCC demanded an increase in the number of SOBOCE shares CIMSA would place in trust, from 4% to 27%, allegedly to ensure CIMSA's compliance with a longer payment schedule. *Id.* at 11-12. In the months that followed, CIMSA attempted to exercise its right of first refusal under the terms proposed in Houston that had been negotiated by the parties. *Id.* at 12. GCC took the position that CIMSA's attempt was invalid, and during the second week of August 2011, sold its SOBOCE shares to the Peruvian company. *Id.*

The 2005 Shareholder Agreement contained an arbitration clause. The parties agreed that any "dispute, litigation, discrepancy, issue, or claim" that may arise "regarding the existence, application, validity, interpretation, compliance or breach, and termination" of the 2005 Shareholder Agreement "shall be submitted to mediation and then to international arbitration for a final resolution, pursuant to the rules and regulations of the Inter-American Commercial Arbitration Commission" (the "IACAC"). *Id.* at 2. The parties further agreed that the arbitration "shall be administered by the national chapter of the [IACAC] in Bolivia[.]" *Id.* (brackets added). CIMSA invoked this clause and submitted a notice of arbitration in November 2011. App. at 169. The arbitration was conducted by a three-person tribunal in La Paz and subject to Bolivian law. *Id.* at 169-70. The parties agreed to bifurcate the arbitration proceedings into a merits phase and a damages phase. *Id.* at 170.

In September 2013, the arbitration tribunal issued a ruling on the merits, holding that GCC breached the right of first refusal in the 2005 Shareholder Agreement and acted inappropriately. *Id.* at 170-71, 352-53. Among other things, the arbitration tribunal found that GCC in 2011 created a legitimate expectation CIMSA's proposed payment schedule would be accepted, yet GCC later turned down the proposal without extending CIMSA an opportunity to submit a new offer. *Id.* at 171, 353-54.

In November 2013, GCC sought leave from a Bolivian court to file a request to annul the arbitration tribunal's ruling on the merits. *Id.* at 180, 675. Once leave was granted and GCC made the filing, the annulment request was assigned to the Eighth Judge for the Civil and Commercial Court of the Judicial District of La Paz (the "Eighth Judge"). *Id.* at 181, 675. In August 2015, the Eighth Judge denied GCC's annulment request (the "Eighth Judge Decision"). *Id.* at 181-82. Unable to directly appeal the Eighth Judge Decision, GCC initiated an *amparo*. *Id.* at 182-83, 383, 675-76. An *amparo* is an extraordinary remedy that must be based on an alleged violation of rights protected by the Bolivian Constitution. *Id.* at 182-83, 676. GCC's *amparo* was assigned to what is known as a "Guarantee Court," which in October 2015 granted GCC's requested relief, annulled the Eighth Judge Decision, and remanded the matter to the Eighth Judge for a new decision. *Id.* at 183-84, 384, 676-77.

The remand of GCC's *amparo* did not immediately end up in front of the Eighth Judge. Because the Guarantee Court sent the case back during a period when the Eighth Judge was known to be on vacation, GCC's *amparo* was assigned to a substitute jurist, the Ninth Judge of the Civil and Commercial Court of the

Judicial District of La Paz (the "Ninth Judge"). *Id.* at 185, 390. Given these unusual circumstances surrounding the remand—and the fact that the existing case record was 30,000 pages—CIMSA moved to disqualify the Ninth Judge. *Id.* at 185-86. Within seven days of receiving the voluminous case file, the Ninth Judge denied CIMSA's disqualification motion and granted a request by GCC to annul and vacate the Eighth Judge Decision (the "Ninth Judge Decision"). *Id.* at 186, 679. CIMSA then filed its own *amparo* against the Ninth Judge Decision, which a Guarantee Court granted in February 2016. *Id.* at 189-90, 681-82.

By law, each Guarantee Court decision in an *amparo* is sent for review to the highest court in Bolivia, the Plurinational Constitutional Tribunal (the "PCT"). *Id.* at 184-85, 676. Remand proceedings in the lower court continue while the PCT conducts its review. *Id.* at 676. In March 2016, the PCT rejected GCC's *amparo* against the Eighth Judge Decision, concluding that the Eighth Judge had not violated GCC's constitutional rights. *Id.* at 191, 387-88. Without providing notice to CIMSA, GCC in July 2016 filed a request for clarification of the March 2016 PCT order reinstating the Eighth Judge Decision. *Id.* at 193-94. After that request was denied, GCC filed a memorandum asking the President of the PCT to address the issue. *Id.* at 194-95. The President obliged, stating in a decree dated November 2016 (but unknown to CIMSA until January 2018) that:

> [I]t is appropriate to reconsider the effects of [the Eighth Judge Decision], in such a way that the acts following the issuance of [the Guarantee Court resolution granting GCC's *amparo* against the Eighth Judge], subsist; that is, the continued adjudication of the

> request for annulment of the award by the judicial authorities, without retroactively invalidating procedural or adjudicative acts[.]

Id. at 195 (brackets added); *see also id.* at 790 (setting forth GCC's translation of this portion of the decree).

Armed with the PCT's March 2016 order, CIMSA withdrew its *amparo* against the Ninth Judge Decision in September 2016. *Id.* at 192. Despite the withdrawal, the PCT notified the parties in November 2016 of an order that had been backdated to May 2016. *Id.* at 192-93. Among other things, the May 2016 PCT order stated that CIMSA had not identified a constitutional right which had been violated by the Ninth Judge. *Id.* The May 2016 PCT order indicated that it did not constitute a ruling on the merits of CIMSA's *amparo* against the Ninth Judge Decision, and added that CIMSA was entitled to file another such *amparo*. *Id.*

Again without providing notice to CIMSA, GCC in November 2016 filed a request for clarification of the PCT's backdated May 2016 order. *Id.* at 196. The PCT then issued an order dated January 2017 (again unknown to CIMSA until January 2018) stating that the Ninth Judge Decision annulling the Eighth Judge Decision "subsists according to the terms established in [herein]." *Id.* (brackets in original); *see also id.* at 795 (setting forth GCC's translation of this portion of the order). The PCT President served as one of the two signatories on the January 2017 order after another PCT judge recused himself. *Id.* at 197. The January 2017 order went into the public record on the same day as the November 2016 decree, which was also the PCT President's last day in office. *Id.* at 197, 407-08.

All told, the Bolivian proceedings concerning the merits award may be summarized as follows:

9/13 Arbitration Merits Award	
GCC files annulment motion	
8/15 Eighth Judge Order Denying Annulment	
GCC files amparo	
10/15 Guarantee Court Ô Order Reversing Eighth Judge	Case is simultaneously remanded
CIMSA appeals to PCT	1/16 Ninth Judge Order Granting Annulment
3/16 PCT Order Reversing Guarantee Court	CIMSA files amparo
GCC files memo with President	2/16 Guarantee Court Order Reversing Ninth Judge
11/16 PCT Presidential Decree On Ninth Judge Order	CIMSA withdraws *amparo*
	11/16 PCT Order On Alleged Constitutional Violation
	GCC files clarification motion with PCT
	1/17 PCT Order On Ninth Judge Order

Meanwhile, proceedings relating to the damages phase of the arbitration were taking place as well. In April 2015, the arbitration tribunal held that CIMSA was entitled to more than $34 million in damages and more than $2 million in fees and costs, resulting in an overall award in excess of $36 million. *Id.* at 174-75. GCC filed a request to annul the damages award in July 2015. *Id.* at 200. The matter was assigned to the Twelfth Civil and Commercial Court of the Judicial District of La Paz (the "Twelfth Judge"), who granted GCC's request and annulled the damages award in October 2015. *Id.* at 201-02,689.

In April 2016, CIMSA filed an *amparo* against the Twelfth Judge's damages decision. *Id.* at 202, 689-90. A Guarantee Court denied CIMSA's *amparo*, but the PCT revoked the denial, found that the Twelfth Judge had violated CIMSA's constitutional rights, and remanded for further proceedings. *Id.* at 202-03, 690-91. According to the parties, the Twelfth Judge has not yet issued a new damages decision on remand. *Cf. id.* at 651 (stating that annulment proceedings on the damages award are "still in process"). Nor has the Twelfth Judge ruled on a motion submitted by GCC prior to October 2015 asserting, based on the purported invalidation of the arbitration tribunal's ruling on the merits, that the Twelfth Judge lacks jurisdiction over the damages annulment request. *Id.* at 1178-79, 1181. Under Bolivian law, an arbitration award is not enforceable while an action to annul the award is pending. *Id.* at 691.

CIMSA initiated this case in September 2015 by filing a petition in federal district court to confirm the arbitration award under the New York Convention. App. at 129-44. Pursuant to the Hague Service Convention, CIMSA delivered a summons and other

materials to the Mexican central authority to serve on GCC. Supp. App. at 55-56. In June 2017, the Mexican central authority notified CIMSA that service had not been effected because GCC's offices supposedly could not be located at the headquarters address shown on GCC's website. *Id.* at 56-57. In May 2018, CIMSA sought permission from the district court to serve GCC through GCC's counsel in the United States. App. at 145-61. Citing Rule 4(f)(3), the district court authorized this alternative form of service. *Id.* at 1124-26.

Around the time it filed the alternative service motion, CIMSA also filed a motion to confirm the arbitration award. *Id.* at 420-69. GCC responded to the confirmation motion and filed a "cross-motion" to dismiss the petition. *Id.* at 481-552. In that combined pleading, GCC contended it was not subject to personal jurisdiction because (1) GCC had not purposefully directed activities at American residents; (2) CIMSA had not adequately alleged the lawsuit arose out of GCC's asserted contacts; and (3) the exercise of personal jurisdiction would not be reasonable. *Id.* at 510-20. GCC further contended that the award could not be confirmed because, *inter alia*, (1) Bolivian courts had nullified or set aside the arbitration tribunal's decision on the merits; and (2) the arbitration tribunal's decision on damages was in the process of judicial review and unenforceable under Bolivian law. *Id.* at 527-50. The district court "considered the jurisdictional challenges" and concluded it could "properly exercise personal jurisdiction over Respondents in this case." *Id.* at 1127, 1132-44. In a separate order, the district court determined that the arbitration tribunal's award was binding for purposes of the New York Convention, and granted CIMSA's petition and confirmation motion. *Id.* at 1237-70.

II. The district court did not err in exercising personal jurisdiction over GCC

It is generally acknowledged that there are "two types of personal jurisdiction: 'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1779-80 (2017) (citation omitted). General jurisdiction involves "continuous and systematic general business contacts" between a party and the forum, empowering the forum "to resolve any dispute involving that party, not just the dispute at issue." *Newsome v. Gallacher*, 722 F.3d 1257, 1264 (10th Cir. 2013) (citations and internal quotation marks omitted). No theory of general jurisdiction has been advanced here.

We thus limit our attention to specific jurisdiction, and we consider the issue solely as the parties have framed it. The parties agree that due process requires constitutionally sufficient "minimum contacts" between the defendant and the forum. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Using this framework, we generally ask "(1) whether the defendant purposefully directed its activities at residents of the forum state; (2) whether the plaintiff's injury arose from those purposefully directed activities; and (3) whether exercising jurisdiction would offend traditional notions of fair play and substantial justice." *Newsome*, 722 F.3d at 1264; *see also Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 614 (10th Cir. 2012) ("Whether a defendant has the requisite minimum contacts with the forum state must be decided on the particular facts of

each case.") (citation and internal quotation marks omitted).[1]

We review a district court's ruling on personal jurisdiction de novo. *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1065 (10th Cir. 2007). "The plaintiff has the burden of proving that the court has jurisdiction." *Id.* When personal jurisdiction is decided on the basis of a complaint and affidavits, both this court and the district court take as true "all well-pled (that is, plausible, non-conclusory, and non-speculative) facts alleged in plaintiffs' complaint." *Dudnikov*, 514 F.3d at 1070 (citations omitted). Any factual disputes in the

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[1] For a claim arising under federal law, we have previously held that "[w]here Congress has statutorily authorized nationwide service of process, such service establishes personal jurisdiction, provided that the federal court's exercise of jurisdiction comports with Fifth Amendment due process." *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1229 (10th Cir. 2006); *see also GCIU-Emp'r Ret. Fund v. Coleridge Fine Arts*, 700 F. App'x 865, 867-68 (10th Cir. 2017) (unpublished) (indicating for a federal claim that if the defendant is not subject to the authority of any state court of general jurisdiction, then jurisdiction may be exercised if it comports with Fifth Amendment due process). Because no party in the case at bar asserts that there is a meaningful distinction between the Fifth and Fourteenth Amendments, we have no occasion to consider that argument, or the potential application of cases like *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206 (10th Cir. 2000). In any event, *Peay* teaches that personal jurisdiction should be refused under the Fifth Amendment in a nationwide-service-of-process case where (1) litigation in the forum is "so gravely difficult and inconvenient" that the defendant "unfairly is at a severe disadvantage in comparison to his opponent;" and (2) this burden on the defendant is not outweighed by "the federal interest in litigating the dispute in the chosen forum[.]" *Id.* at 1212-13 (citations omitted). For the reasons discussed below, GCC has not satisfied these criteria.

parties' affidavits are also resolved "in plaintiffs' favor." *Id.*

A. GCC's objection to the use of nationwide contacts fails

In limited circumstances, Rule 4(k)(2) allows courts to examine a defendant's contacts with the United States as a whole, as opposed to contacts with a particular state. The Rule provides that for "a claim that arises under federal law," serving a summons establishes personal jurisdiction if "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction," and "exercising jurisdiction is consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2)(A)–(B). GCC argues that CIMSA cannot invoke Rule 4(k)(2) because the plaintiff has the burden to establish personal jurisdiction and there is no evidence (from CIMSA or otherwise) that GCC is not subject to the jurisdiction of any of the 50 states.

GCC forfeited these Rule 4(k)(2) arguments by failing to raise them in district court. CIMSA alleged in its petition that GCC's "activities at several jurisdictions within the United States" were sufficient "for specific personal jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2), the federal long arm statute, where, as here, Respondents are not subject to general jurisdiction in any state of the United States." App. at 133. GCC responded to CIMSA's motion to confirm the arbitration award and simultaneously filed a "cross-motion" to dismiss CIMSA's petition. *See supra § I.* GCC argued that CIMSA had not shouldered its burden to show "purposeful availment," an injury "arising out of" relevant contacts, and reasonableness for purposes of personal jurisdiction. *Id.* GCC did not assert, however,

that its nationwide contacts could not or should not be aggregated.

Nor did GCC oppose aggregating nationwide contacts in subsequent district court briefs. CIMSA pointed this out in its reply brief in support of the motion to confirm the award:

> Rule 4(k)(2) permits federal courts to aggregate a foreign defendant's nationwide contacts in order to exercise jurisdiction where the defendant's contacts with any individual state are insufficient. In order to establish jurisdiction under Rule 4(k)(2), a plaintiff must show that (1) the claim arises under federal law; (2) the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state; and (3) the court's exercise of jurisdiction would be consistent with the Constitution and laws of the United States. Respondents do not dispute the first two requirements for jurisdiction under Rule 4(k)(2). Rather, Respondents argue that, under the third element, the Court's exercise of jurisdiction would not comport with due process.

App. at 926-27 (citations, internal quotation marks, and indentation omitted). And CIMSA's reply brief was not the last word. GCC filed what it styled as a reply in support of its cross-motion to dismiss. *Id.* at 1046-1123. Once more, GCC said its contacts did not satisfy the requirements of purposeful availment, relatedness, and reasonableness. *Id.* at 1074-93. But GCC never argued before the district court that those contacts could not, or should not, be aggregated under Rule 4(k)(2).

GCC's arguments on appeal challenging the application of Rule 4(k)(2) thus come too late. GCC's decision not to raise those arguments in the district court constitutes a forfeiture, rather than a waiver, and thus is reviewable for plain error. *See Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1273 (10th Cir. 2020) (explaining that a waiver requires intentional relinquishment or abandonment, whereas a forfeiture arises through mere neglect). Nevertheless, "[i]n order to avoid a waiver on appeal, a party is required to identify plain error as the standard of review in their opening brief and to provide a defense of that standard's application." *Id.; see also McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) ("A party cannot count on us to pick out, argue for, and apply a standard of review for it on our own initiative, without the benefit of the adversarial process, and without any opportunity for the adversely affected party to be heard on the question."). This principle applies here, as GCC did not discuss the plain error factors in its opening appellate brief. *See*, *e.g.*, *Benham v. Ozark Materials River Rock*, *LLC*, 885 F.3d 1267, 1276-77 (10th Cir. 2018) (converting a forfeiture to a waiver in the absence of an argument for plain error).

It is true that "[t]his forfeiture rule does not apply when the district court explicitly considers and resolves an issue of law on the merits. In that circumstance, the appellant may challenge that ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in the district court." *Tesone v. Empire Mktg Strategies*, 942 F.3d 979, 991-92 (10th Cir. 2019) (citation and internal quotation marks omitted). In a footnote, the district court in this case cited authority for the proposition that GCC did not shoulder its burden to "name some other state in which the suit could proceed" under Rule 4(k)(2). App.

at 1133 n.4. But the district court made that observation only after confirming that GCC "d[id] not dispute" CIMSA's contention that GCC was not subject to jurisdiction in any state. *Id.* The district court therefore focused on the arguments GCC did make, i.e., "whether the Court's exercise of personal jurisdiction would comport with due process." *Id.* GCC does not assert on appeal that the forfeiture rule is inapplicable because the district court ruled on Rule 4(k)(2)'s "no state" requirement. Even if GCC had made such an argument, the facts in this case are unique—the district court addressed the "no state" issue only in passing and in dicta. *Cf. Tesone*, 942 F.3d at 992 (stating that a district court "passes upon" an issue "when it applies the relevant law to the relevant facts") (citation and internal quotation marks omitted).

Even assuming *arguendo* that the issue was properly preserved, we find GCC's Rule 4(k)(2) arguments unpersuasive. The First Circuit was the first circuit court to address how burdens of proof should be allocated under Rule 4(k)(2). That court held a plaintiff seeking to invoke 4(k)(2) must "make a prima facie case for the applicability of the rule," including a certification "based on the information that is readily available to the plaintiff and his counsel" that "the defendant is not subject to suit in the courts of general jurisdiction of any state." *United States v. Swiss Am. Bank*, *Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999). The Fourth Circuit has cited *Swiss Am. Bank* with approval, albeit without extensive analysis. *E.g.*, *Base Metal Trading*, *Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 215 (4th Cir. 2002). Every other circuit court to consider the issue has placed the initial burden on the defendant to identify a state in which the lawsuit could proceed. *E.g.*, *Touchcom*, *Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1413-15 (Fed. Cir. 2009); *Oldfield v.*

Pueblo De Bahia Lora, *S.A.*, 558 F.3d 1210, 1218 n.22 (11th Cir. 2009); *Holland Am. Line Inc. v. Wartsila N. Am.*, *Inc.*, 485 F.3d 450, 461-62 (9th Cir. 2007); *Mwani v. Bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005); *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 650-51 (5th Cir. 2004); *ISI Int'l*, *Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551-52 (7th Cir. 2001).

The rationale for the majority rule was articulated by the Seventh Circuit in *ISI.* That court explained:

> Now one might read Rule 4(k)(2) to make matters worse by requiring 51 constitutional decisions: The court must first determine that the United States has power and then ensure that none of the 50 states does so . . . . Constitutional analysis for each of the 50 states is eminently avoidable by allocating burdens sensibly. A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).

256 F.3d at 552. Other appellate courts have agreed with this reasoning, often expressly choosing the Seventh Circuit's approach over the First Circuit's approach. *See*, *e.g.*, *Touchcom*, 574 F.3d at 1414-15 (noting the First Circuit's decision in *Swiss Am. Bank* but concluding "the approach articulated by the Seventh Circuit is more in tune with the purposes

behind the enactment of Rule 4(k)(2)"); *Holland*, 485 F.3d at 461-62 (acknowledging *Swiss Am. Bank* but deciding to "join the Fifth, Seventh, and D.C. Circuits").

Based on the arguments presented by the parties in this case, we join the majority. Following the prevailing rule on aggregating contacts under Rule 4(k)(2) is consistent with this court's unpublished decision in *GCIU*. There, we applied the Rule after observing the defendants had conceded the plaintiff's claims arose under federal law and "no state court has jurisdiction over them." 700 F. App'x at 867-68. We cited *Holland* for the proposition that "a defendant who wants to preclude the use of Rule 4(k)(2) has only to name some other state in which the suit could proceed." *Id.* at 868; *see also GCIU-Emp'r Ret. Fund v. Coleridge Fine Arts*, 808 F. App'x 655, 661-66 (10th Cir. 2020) (unpublished) (holding, after remanding the case for additional discovery, that personal jurisdiction was lacking). Continuing in *GCIU's* footsteps, we adopt the approach endorsed by the Fifth, Seventh, Ninth, Eleventh, District of Columbia, and Federal Circuits.

B. GCC's contacts were sufficient to confer jurisdiction

Aside from resisting the application of Rule 4(k)(2), GCC challenges personal jurisdiction on other grounds. First, GCC asserts that neither CIMSA's claim to enforce the arbitration award nor CIMSA's underlying claim arises from GCC's alleged contacts with the United States. Second, GCC argues that the exercise of personal jurisdiction would be inconsistent with traditional notions of fair play and substantial justice. We address each argument in turn.

1. CIMSA's injury was "proximately caused" by, and thus arose out of, GCC's contacts

A plaintiff's injury must "arise out of or relate to" the defendant's forum contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (citation omitted). "The import of the `arising out of' analysis is whether the plaintiff can establish that the claimed injury resulted from the defendant's forum-related activities." *Newsome*, 722 F.3d at 1271. This requirement has been subject to different interpretations. "Some courts have interpreted the phrase 'arise out of' as endorsing a theory of 'but-for' causation, while other courts have required proximate cause to support the exercise of personal jurisdiction." *Dudnikov*, 514 F.3d at 1078 (citations omitted). But-for causation means "any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction." *Id.* "[C]onsiderably more restrictive" is proximate causation, which turns on "whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Id.* (citation omitted).

This court on several occasions has declined to choose between but-for and proximate causation, finding that neither test was outcome determinative given the facts at hand. *E.g.*, *Newsome*, 722 F.3d at 1270; *Dudnikov*, 514 F.3d at 1079. Nonetheless, "[i]n contract actions, we have consistently applied the more-restrictive proximate-cause approach," *Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1161 n.7 (10th Cir. 2010), and the parties here agree that proximate causation is required. Consequently, in evaluating the "arising out of' requirement, we must "determine whether a nexus exists" between GCC's "forum-related contacts" and CIMSA's "cause of

action." *Monge*, 701 F.3d at 614 (citation omitted); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1781 (stating that "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State") (brackets in original, citation and internal quotation marks omitted).[2] The "arising out of" requirement is not satisfied when a plaintiff "would have suffered the same injury even if none of the [defendant's forum] contacts had taken place." *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456-57 (10th Cir. 1996) (brackets in original, citation and internal quotation marks omitted).

We have, however, rejected a "third approach" which veers away from "causation-based principles." *Dudnikov*, 514 F.3d at 1078. This third approach "asks whether there is a 'substantial connection' or 'discernible relationship' between the contacts and the suit." *Id.* (citation omitted). Put another way, the "substantial connection" test "merely requires the tie between the defendant's contacts and the plaintiff's claim [to be] close enough to make jurisdiction fair and reasonable." *Emp'rs Mut.*, 618 F.3d at 1160-61 n.6 (brackets in original, citation and internal quotation marks omitted). Among other things, we have held that "the 'substantial connection' test inappropriately blurs the distinction between specific and general personal jurisdiction." *Dudnikov*, 514 F.3d at 1078; *see also Emp'rs Mut.*, 618 F.3d at 1161 (confirming that "we

[2] The Supreme Court explained in *Bristol-Myers Squibb* that "since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." 137 S. Ct. at 1783-84.

have rejected the substantial-connection approach outright").

Although the parties agree that a "proximate cause" test applies, they dispute which contacts are relevant to the analysis. GCC contends that because the claim at this stage is merely to confirm a foreign arbitral award, the only contacts that matter are those relating to the arbitration. To press this point, GCC argues that the jurisdictional landscape changed with the Supreme Court's decision in *Bristol-Myers Squibb.* But that case merely applied the principle that there must be "a connection between the forum and the specific claims at issue," holding that personal jurisdiction over a corporate defendant was lacking with respect to nonresident products liability plaintiffs who suffered no harm in, and whose claims were based on conduct outside, the forum. 137 S. Ct. at 1780-83. The Supreme Court made clear that it resolved the matter using "settled principles" of personal jurisdiction. *Id.* at 1781, 1783.

Based on the facts and arguments presented here, we conclude that contacts relating to the underlying claim (i.e., the formation and alleged violation of the 2005 Shareholder Agreement) are pertinent. Consistent with the Due Process Clause, a court may exercise specific personal jurisdiction only if "the litigation results from alleged *injuries"* that arise out of or relate to activities by the defendant which were purposefully directed at the forum. *Burger King*, 471 U.S. at 472-73 (emphasis added, citations omitted); *accord Newsome*, 722 F.3d at 1269-71. In a case like this one, this guidance makes more sense—and perhaps only makes sense—if applied with an eye toward the underlying dispute. Although personal jurisdiction turns on due process principles, rather than the elements of a given

claim, an action to confirm or enforce an arbitral award does not involve a conventional "injury."

"Under the New York Convention, a court must '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.' *CEEG (Shanghai) Solar Sci. & Tech. Co. v. LUMOSLLC*, 829 F.3d 1201, 1206 (10th Cir. 2016) (quoting 9 U.S.C. § 207). The New York Convention thus enumerates "specific" and exclusive grounds "on which a court with secondary jurisdiction may refuse enforcement." *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-88 (5th Cir. 2004). Article V sets forth those seven grounds:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> >
> > (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, 21 U.S.T. 2157, art. V(1)–(2).

A confirmation action under the New York Convention "is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm." *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007); *accord Argentine Republic v. Nat'l Grid PLC*, 637 F.3d 365, 369 (D.C. Cir. 2011). This more limited focus means that "[t]he party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies." *Zeiler*, 500 F.3d at 164; *see also CEEG*, 829 F.3d at 1206 ("As the party opposing enforcement of the arbitral award, LUMOS bears the burden of proving that one of the defenses applies."). These substantive and procedural features of an action to confirm an arbitration award support the conclusion that the proper jurisdictional inquiry is whether the beneficiary of an award can show he or she sustained an injury caused by the defendant's forum activities in connection with the claim that led to the arbitration, as opposed to an injury caused by the defendant's forum activities in connection with the arbitration proceeding itself. We therefore agree with CIMSA's suggested approach to the due process analysis, which is not limited to GCC's conduct at the arbitration.

As it is a close question whether CIMSA's underlying claim arose out of GCC's nationwide contacts, it is important that we apply the operative legal standard with precision. The Supreme Court "has not yet explained the scope" of the "arising out of' requirement. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007); *see also SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) ("The Supreme Court has yet to address exactly how a

defendant's activities must be tied to the forum for a court to properly exercise specific personal jurisdiction over a defendant."). In *Dudnikov*, we cited *O'Connor* when articulating the type of proximate causation required for purposes of personal jurisdiction. *Dudnikov*, 514 F.3d at 1078. *O'Connor* clarified that proximate causation in this context is not necessarily coterminous with proximate causation in the tort context:

> With each purposeful contact by an out-of-state resident, the forum state's laws will extend certain benefits and impose certain obligations . . . . The relatedness requirement's function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact tailored to that contact's accompanying substantive obligations. The causal connection can be somewhat looser than the tort concept of proximate causation, but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.

496 F.3d at 323 (citations omitted). Other cases similarly suggest that tort-level proximate causation may not always be required. *See SPV Osus*, 882 F.3d at 344 (indicating that proximate cause is required when a defendant "had only limited contacts," but may not be required where the defendant's contacts "are more substantial") (citation omitted); *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996) ("[W]e intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate. We think such flexibility is necessary in the jurisdictional inquiry;

relatedness cannot merely be reduced to one tort concept for all circumstances.").

We agree that the test for proximate causation for purposes of personal jurisdiction may be, in appropriate circumstances, somewhat looser than the tort concept of proximate causation. CIMSA has satisfied that test in this case. GCC met with CIMSA in Miami in 2005 to discuss a potential purchase of shares of SOBOCE. *See supra* § I. After the Miami meeting, GCC and CIMSA consummated the 2005 Shareholder Agreement with a right of first refusal. *Id.* In 2009 and 2010, the parties met multiple times in Miami to discuss how CIMSA would exercise its right of first refusal once GCC indicated it intended to sell its SOBOCE shares. *Id.* The parties then signed the 2010 Shareholder Agreement in Bolivia, but the actions of the Bolivian government prevented the transaction from closing. *Id.* CIMSA proposed new terms in Houston in 2011, which GCC subsequently appeared to accept. *Id.* Using New York counsel and contemplating the application of New York law, the parties began drafting the 2011 Agreement. *Id.* At the eleventh hour, GCC took the position that there was no agreement and CIMSA could not exercise its right of first refusal, a position that was later rejected by arbitrators in Bolivia who awarded CIMSA more than $36 million. *Id.*

GCC's American contacts bear at least some causal relationship with CIMSA's injury, even if CIMSA's loss was not proximately caused in a tort sense by GCC's activities in the United States. CIMSA's injury became manifest when GCC declined to honor the right of first refusal. Although GCC technically rejected CIMSA's offer after the parties met in Houston in 2011 (which came after the parties' meetings in Miami in

2005, 2009, and 2010), those prior meetings contributed to CIMSA's understanding that the parties had agreed on terms for CIMSA to exercise the right of first refusal and purchase GCC's SOBOCE shares. *Id.* Had GCC allegedly not led CIMSA to this belief, GCC's excuse for not honoring the right of first refusal in the 2005 Shareholder Agreement might have carried more weight, and at a minimum the timing and circumstances of the breach could have been different. These contacts in 2005, 2009, 2010, and 2011 are all "relevant to the merits of the plaintiff's claim," *Dudnikov*, 514 F.3d at 1078, thereby satisfying the "arising out of" requirement.

Our holding that CIMSA's harm arises out of GCC's American contacts should not be understood as unduly diluting the proximate causation standard or adopting a "substantial connection" test. As noted, under the but-for test, a plaintiff must show that "any event in the causal chain" leading to injury is "sufficiently related to the claim." *Dudnikov*, 514 F.3d at 1078 (citation omitted). Under the "substantial connection" test, the plaintiff's only obligation is to show some reasonable tie "between the defendant's contacts and the plaintiff's claim." *Emp'rs Mut.*, 618 F.3d at 1160-61 n.6 (citation and internal quotation marks omitted). GCC's contacts not only constitute events in the causal chain leading to CIMSA's financial loss, but also form part of the narrative determining when and how GCC's breach occurred. And because GCC's contacts have causative features, relying on them should not and cannot be interpreted as reviving any "substantial connection" standard.

Likewise, finding some form of proximate causation is not inconsistent with our prior decisions. Previous contract cases that have addressed the "arising out of"

element do not necessarily speak to the specific facts now before the court, but several of those earlier decisions deem that element satisfied. *See*, *e.g.*, *TH Agric. & Nutrition*, *LLC v. ACE European Grp. Ltd.*, 488 F.3d 1282, 1291-92 (10th Cir. 2007) (finding the "arising out of" requirement satisfied where the defendants' contacts included a denial of insurance coverage under one or more contracts classifying the forum as "covered territory," with at least one allegedly covered claim filed in the forum); *Pro Axess*, *Inc. v. Orlux Distribution*, *Inc.*, 428 F.3d 1270, 1278-79 (10th Cir. 2005) (finding the requirement satisfied where the defendant knowingly solicited the plaintiff in the forum, developed and supposedly broke a business agreement with the plaintiff in the forum, and communicated with the plaintiff in the forum); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1076-78 (10th Cir. 2004) (finding the requirement satisfied where the defendant knowingly entered into a contract with a forum resident calling for at least partial performance in the forum, sent employees to the forum to conduct due diligence, and sent correspondence to the forum); *OMI Holdings*, *Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1095 (10th Cir. 1998) (finding the requirement satisfied where the defendant issued, but allegedly failed to honor, insurance policies requiring a defense from suit in the forum). We conclude that GCC's contacts in connection with the claim underlying the arbitration satisfy the test for "proximate cause" for purposes of personal jurisdiction.

2. Relying on GCC's contacts was consistent with fair play and substantial justice

The next issue is whether the district court's exercise of personal jurisdiction was reasonable. "Even when a defendant has purposefully established

minimum contacts with a forum state, 'minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction.'" *TH*, 488 F.3d at 1292 (quoting *Burger King*, 471 U.S. at 477-78). We consider "(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies." *OMI*, 149 F.3d at 1095. A defendant must present a "compelling" case that factors like these render jurisdiction unreasonable. *Burger King*, 471 U.S. at 477. The reasonableness inquiry "evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *TH*, 488 F.3d at 1292 (brackets in original, citation and internal quotation marks omitted). Still, instances where the exercise of personal jurisdiction offends fair play and substantial justice are "rare." *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1102 (10th Cir. 2009); *accord Newsome*, 722 F.3d at 1271.

GCC's case for unreasonableness has some traction, but is less than compelling. Even taking into account a sliding scale, CIMSA's demonstration of minimum contacts is not so feeble as to provide a definitive advantage to GCC. CIMSA may only narrowly satisfy the "arising out of" requirement, but there is no bona fide challenge in GCC's opening appellate brief to CIMSA's showing of "purposeful availment." GCC asserts in its appellate reply brief that it did not surrender the debate over purposeful availment, but GCC's point heading in its opening brief only referred

to the "arising out of' requirement, with any "purposeful availment" arguments buried at the end of that section (Aplt. Br. at 29-32). That is not enough to preserve the issue. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W] e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Cont'l Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) ("An issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal."). Furthermore, with only one possible exception, each of the five reasonableness factors at best only marginally supports GCC.

The first reasonableness factor recognizes that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987); *see also OMI*, 149 F.3d at 1096 (urging "great care and reserve" before exercising personal jurisdiction over a defendant from another country) (citation omitted). GCC's onus associated with litigating an arbitration confirmation action in the United States is real but not crushing. GCC previously traveled to the United States for meetings, has its General Counsel located here, and does hundreds of millions of dollars of business here. *See supra* § I; Supp. App. at 179-81. "[Modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engaged in economic activity." *Burger King*, 471 U.S. at 474 (citation omitted). The progression of this case has shown that

GCC has the wherewithal to defend itself in an American forum.

As to the second reasonableness factor, "States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors." *OMI*, 149 F.3d at 1096; *see also id.* (explaining that a state's interest "is also implicated where resolution of the dispute requires a general application of the forum state's law"). CIMSA is not a United States resident, so America's "interests in the dispute" are "considerably diminished." *Asahi*, 480 U.S. at 114. Similarly, the financial harm which prompted CIMSA's arbitration confirmation action involves a Bolivian plaintiff, a Mexican defendant (though with ties to the United States), and a contract governed by Bolivian law. *See supra § I.* Nevertheless, the Supreme Court has declared that the "emphatic federal policy in favor of arbitral dispute resolution" applies "with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1514 (10th Cir. 1995) (commenting that the "federal policy favoring arbitration for dispute resolution" is "particularly strong in the context of international transactions") (citations omitted). Given the New York Convention and its implementation in the United States through the Federal Arbitration Act, America has at least some interest in providing a forum.

The third reasonableness factor "evaluates whether the plaintiff may receive convenient and effective relief in another forum." *TH*, 488 F.3d at 1294. This factor "may weigh heavily in cases where a Plaintiff's chances of recovery will be greatly diminished by forcing him to litigate in another forum because of that

forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit." *Benton*, 375 F.3d at 1079 (citation omitted). GCC argues that Mexico can confirm any arbitration award, and it appears Mexico is indeed a signatory to the New York Convention. *See* New York Arbitration Convention ("NYAC") website, http://www.newyorkconvention.org/countries (last visited July 17, 2020) (indicating that Mexico signed in 1971). We also recognize that in the context of motions seeking dismissal based on the doctrine of forum non conveniens, courts frequently hold (or affirm, under an abuse of discretion standard) that Mexico is an available and adequate forum. *E.g.*, *In re Ford Motor Co.*, 591 F.3d 406, 412-13 (5th Cir. 2009); *Loya v. Starwood Hotels & Resorts Worldwide*, *Inc.*, 583 F.3d 656, 664 (9th Cir. 2009). The Fifth Circuit, for instance, has held not only that Mexico is adequate in certain circumstances, but also that there is "a nearly airtight presumption" that Mexico is available. *Saqui v. Pride Cent. Am.*, *LLC*, 595 F.3d 206, 211-13 (5th Cir. 2010).

Yet even if we assume for purposes of argument that Mexico generally is an available and adequate forum, the record shows CIMSA has encountered specific roadblocks in this case. The district court found that GCC obtained "an *ex parte* order from a Mexican court expressly enjoin[ing] CIMSA from commencing any proceedings to confirm the award in Mexico." App. at 1142 (brackets and emphasis in original, citation and internal quotation marks omitted). The district court additionally detected an inability or unwillingness on the part of the Mexican central authority to timely serve GCC with process at the publicized address of GCC's corporate headquarters. *Id.* at 1143 n.6. Relief (including an appeal of the *ex parte* order) may be theoretically available in Mexico, but that does not

negate the actual, practical difficulties CIMSA has faced. We make no broad declarations about the competence or good faith of any foreign court, in Mexico or elsewhere. *Cf. Saqui*, 595 F.3d at 212-13 (concluding that the record was insufficient to establish "corruption" and "long delays" in the Mexican court system). Instead, we merely conclude that the third reasonableness factor does not favor GCC based on evidence particular to this dispute.[3]

The fourth reasonableness factor "asks whether the forum state is the most efficient place to litigate the dispute." *TH*, 488 F.3d at 1296 (citation and internal quotation marks omitted). "Key to this inquiry are the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *OMI*, 149 F.3d at 1097 (citations omitted). Neither GCC nor CIMSA contends that the location of witnesses points toward any specific forum. But the underlying controversy is governed by Bolivian law, and it is by no means clear that GCC's breach of the right of first refusal occurred in the United States. *See supra* § I. Moreover, a confirmation proceeding in Mexico would be somewhat more effi-

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[3] GCC hints that Bolivia, too, could confirm any arbitration award. Because CIMSA has established minimum contacts, however, it is GCC's responsibility to make a compelling case for "unreasonableness." *Burger King*, 471 U.S. at 477. Although it appears that Bolivia signed the New York Convention, *see* NYAC website, http://www.newyorkconvention.org/countries (last visited July 17, 2020) (indicating that Bolivia signed in 1995), GCC has not established that a Bolivian confirmation proceeding would be convenient and effective. In fact, the evidence provided by CIMSA describing Bolivian court developments in this matter suggests the opposite. Hence, on this record, we lack a sufficient basis to construe the third factor in GCC's favor.

cient than a confirmation proceeding in the United States. Judicial proceedings concerning the legal validity of the arbitral award are pending in Mexico, so a confirmation action in that country could consolidate at least parts of the litigation. All of this means that the fourth factor is the one most aligned with GCC's position.

The fifth reasonableness factor focuses on "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction." *Asahi*, 480 U.S. at 115 (emphasis omitted). "Important to this inquiry is the extent to which jurisdiction in the forum state interferes with the foreign nation's sovereignty." *OMI*, 149 F.3d at 1098. "Relevant considerations include whether one of the parties is a citizen of a foreign nation, whether the foreign nation's law governs the dispute, and whether the foreign nation's citizen chose to conduct business with a forum resident." *TH*, 488 F.3d at 1297 (citation and internal quotation marks omitted). Here, no party is a citizen of the United States, Bolivian law governs the underlying dispute, and American confirmation might initiate enforcement of an arbitration award that is later invalidated by Bolivian courts. *See supra* § I. These facts point in GCC's direction. Yet the possibility of foreign confirmation of an award that is unenforceable in the home country was contemplated by all signatories to the New York Convention, including Bolivia, thereby reducing the threat of sovereign intrusion. *See infra §* III. And although CIMSA chose to work with a pair of Mexican entities, GCC does a substantial amount of business in the United States (even if that business is largely unconnected to the dispute giving rise to the arbitration), and the parties conducted multiple meetings in America. *See supra* § I. It follows that while GCC's showing on the fifth

reasonableness factor is more than colorable, there are countervailing considerations as well.

In sum, GCC's "unreasonableness" arguments are far from frivolous, but they are not so compelling as to overcome CIMSA's demonstration of minimum contacts. *See Emp'rs Mut.*, 618 F.3d at 1164 ("Although certain traditional notions of fair play and substantial justice favored [the defendant], it failed to establish a 'compelling case' that personal jurisdiction would be unreasonable.") (brackets added); *see also Newsome*, 722 F.3d at 1274 ("A handful of considerations favor defendants. But they have not carried their overall burden of convincing us that [forum] jurisdiction would offend fair play and substantial justice.") (brackets added). We conclude that the district court's exercise of personal jurisdiction over GCC was consistent with due process.

C. CIMSA properly served GCC with process

GCC's final jurisdictional objections relate to service of process. "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Service of process notifies a defendant of the commencement of an action against him and "marks the court's assertion of jurisdiction over the lawsuit." *Okla. Radio Assocs. v. FDIC*, 969 F.2d 940, 943 (10th Cir. 1992). Stated differently, "service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Omni*, 484 U.S. at 104 (citation and brackets omitted); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017) ("[A]bsent consent, a basis for service of a summons on the defendant is pre-

requisite to the exercise of personal jurisdiction.") (brackets added).

Evaluating GCC's challenges requires us to examine the Hague Service Convention. The purpose of that agreement is to "simplify, standardize, and generally improve the process of serving documents abroad." *Water Splash*, *Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017). The "primary invention" of the Convention "is that it requires each state to establish a central authority to receive requests for service of other documents from other countries." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988) (citing Article 2). "When a central authority receives an appropriate request, it must serve the documents or arrange for their service, and then provide a certificate of service." *Water Splash*, 137 S. Ct. at 1508 (citing Articles 5-6). "A state also may consent to methods of service within its boundaries other than a request to its central authority." *Schlunk*, 486 U.S. at 699 (citing Articles 8-11 and 19). For example, Article 10 says that "[p]rovided the State of destination does not object," the Convention "shall not interfere" with "the freedom to send judicial documents, by postal channels, directly to persons abroad," or with the freedom of certain individuals "to effect service of judicial documents directly" through "judicial officers, officials or other competent persons in the State of destination." 20 U.S.T. 361, art. 10(a)–(c). "[C]ompliance with the Convention is mandatory in all cases to which it applies[.]" *Schlunk*, 486 U.S. at 705 (brackets added).

Both Mexico and the United States are signatories to the Hague Service Convention. *See* Hague Conference on Private International Law ("HCCH") website, https://www.hcch.net/en/instruments/conventions/status-table/

?cid=17 (last visited July 17, 2020) (indicating that the treaty entered into force for Mexico in 2000 and the United States in 1969). Mexico has lodged certain objections to alternative forms of service. Continuing with the Article 10 example, Mexico declared in 1999 that "[i]n relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory" according to the procedures described in sub-paragraphs (a), (b), and (c), "unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees." HCCH website, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=412&disp=resdn (last visited July 17, 2020).[4] In 2011, Mexico stated that "[i]n accordance with Article 21, second paragraph, sub-paragraph a), Mexico declares that it is opposed to the use in its territory of the methods of transmission provided for in Article 10." *Id.*

Evaluating GCC's challenges also requires us to examine Rule 4. Rule 4(h) states in part that absent a waiver or federal law to the contrary, a "foreign

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[4] In carrying treaties into effect, the "public acts and proclamations of [foreign] governments, and those of their publicly recognized agents," are "historical and notorious facts, of which the court can take regular judicial notice." *Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 612 (3d Cir. 2008) (brackets in original, quoting *United States v. Reynes*, 50 U.S. (9 How.) 127, 147-48 (1850)). Because the statements of Mexico's position appearing on the Hague Service Convention website are "not subject to reasonable factual dispute" and "capable of determination using sources whose accuracy cannot reasonably be questioned," *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009), they are subject to judicial notice.

corporation" must be served "at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Fed. R. Civ. P. 4(h)(2). Rule 4(f), in turn, states as follows:

> (f) SERVING AN INDIVIDUAL IN A FOREIGN COUNTRY. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(1)–(3).

GCC contends that in light of Mexico's objections, the Hague Service Convention does not authorize service methods beyond the use of that country's central authority. But the relevant inquiry under Rule 4(f)(3) is not whether the agreement affirmatively endorses service outside the central authority. *Cf.* Fed. R. Civ. P. 4(f)(1) (contemplating "any internationally agreed means" of service under the Hague Service Convention). It is whether the alternative service method in question is "prohibited" by the agreement. Fed. R. Civ. P. 4(f)(3). The district court approved service on GCC's American counsel because the Mexican central authority did not or would not serve GCC, despite a well-known headquarters address. *See supra* § I; App. at 1143 n.6. Several tribunals have held—Article 10 objections notwithstanding—that the Convention does not contain a specific prohibition on this form of service. *See*, *e.g.*, *SEC v. de Nicolas Gutierrez*, No. 17cv2086-JAH (JLB), 2020 WL 1307143, at *3 (S.D. Cal. Mar. 19, 2020) (holding that service on American counsel is permissible "even taking into account Mexico's objection to certain articles of the Hague Convention," including Article 10); *FTC v. Repair All PC, LLC*, No. 1:17 CV 869, 2017 WL 2362946, at *3-4 (N.D. Ohio May 31, 2017) (remarking that "[t]here are numerous cases where courts have permitted service through U.S. counsel despite the

foreign signatory's objection to Article 10 of the Hague Convention," and upholding such service even though "India has objected to Article 10"); *Carrico v. Samsung Elecs. Co., Ltd.*, No. 15-cv-02087-DMR, 2016 WL 2654392, at *4 (N.D. Cal. May 10, 2016) (holding that "[n]othing in the Hague Convention bars Plaintiffs' requested service on Park through her attorney," despite the Republic of Korea's objections to various articles); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014) (holding, despite China's objection to Article 10, that the Convention "does not prohibit" service on United States counsel, "a common method of service under Rule 4(f)(3)"); *RSM Prod. Corp. v. Fridman*, No. 06 Civ. 11512(DLC), 2007 WL 2295907, at *4 (S.D.N.Y. Aug. 10, 2007) (determining that the Convention was inapplicable, but even so, "the Russian Federation's objections to Articles 8 and 10 do not prohibit" service through an American attorney). In short, "numerous courts have authorized alternative service under Rule 4(f)(3)," including "[s]ervice upon a foreign defendant's United States-based counsel," in cases involving countries that "have objected to the alternative forms of service permitted under Article 10 of the Hague Convention." *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158, at *11-13 (N.D. Cal. July 1, 2011).[5] We therefore decline to embrace GCC's complaint based on the Convention.

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[5] The parties have not briefed whether an objection to Article 10 of the Hague Service Convention prohibits service by email. We express no view on that issue. Nor have the parties briefed whether service on GCC's American counsel was "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover*

GCC additionally asserts that service on United States counsel is foreclosed by the text of Rule 4(f), which envisions service "at a place not within any judicial district of the United States[.]" Here too, however, courts have held that the "proper construction" of Rule 4(f)(3) vis-á-vis a foreign defendant includes service via "delivery to the defendant's attorney." *Rio Props.*, *Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002); *see also Marks Law Offices*, *LLC v. Mireskandari*, 704 F. App'x 171, 177 (3d Cir. 2017) (unpublished) (citing *Rio Props.* for the same point); *Freedom Watch*, *Inc. v. Org. of the Petroleum Exporting Countries (OPEC)*, 766 F.3d 74, 83 (D.C. Cir. 2014) ("A number of courts thus have sanctioned service on United States counsel as an alternative means of service under Rule 4(f)(3) without requiring any specific authorization by the defendant for the recipient to accept service on its behalf."); *Nuance Commc'ns*, *Inc. v. Abbyy Software House*, 626 F.3d 1222, 1239-40 (Fed. Cir. 2010) (indicating that service may be made under Rule 4(f)(3) "on Defendants' domestic subsidiaries or domestic counsel"). Among the theories supporting this view is that "court orders generally crafted under Rule 4(f)(3) require transmission of service papers to a foreign defendant via a domestic conduit like a law firm or agent—ultimately, the foreign individual is served and thereby provided notice outside a United States judicial district, in accordance with Rule 4's plain language." *Cathode Ray Tube*, 27 F. Supp. 3d at 1010; *see also Bazarian Int'l Fin. Assocs.*, *LLC v. Desarrollos Aerohotelco*, *C.A.*, 168 F. Supp. 3d 1, 14 (D.D.C. 2016) ("This Court disagrees with the defendants' cramped

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Bank & Trust Co., 339 U.S. 306, 314 (1950). We likewise save that topic for another day.

interpretation of Rule 4(f) and instead holds that permitting service of a foreign individual or corporation through retained United States counsel does not run afoul of the rule's application to individuals and corporations located in foreign countries, where service will be completed."). We thus decline to adopt GCC's complaint based on Rule 4(f)(3) as well.

III. The district court did not err in confirming the arbitration tribunal's decisions

As described *supra* in § II.B.1, a district court must confirm a foreign arbitration award under the New York Convention unless the party opposing confirmation makes a specified showing. The New York Convention states in Article V that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof' of an enumerated defense. 21 U.S.T. 2157, art. V(1). Courts construe Article V defenses "narrowly," to "encourage recognition and enforcement of commercial arbitration agreements in international contracts." *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 497 (5th Cir. 2020) (citations and internal quotation marks omitted); *see also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096 (9th Cir. 2011) ("These defenses are construed narrowly, and the party opposing recognition or enforcement bears the burden of establishing that a defense applies."). One such defense is that "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was

made." New York Convention, 21 U.S.T. 2157, art. V(1)(e).

Relying on this portion of Article V, GCC argues that the district court should not have confirmed CIMSA's arbitration award for two reasons. First, GCC contends that the award on the merits has been set aside or suspended by a competent Bolivian authority. Second, GCC maintains that the damages award is not binding because GCC is in the process of challenging it in a Bolivian court. "We review a district court's legal interpretations of the New York Convention as well as its contract interpretation *de novo;* findings of fact are reviewed for clear error." *VRG Linhas Aeras S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322, 325 (2d Cir. 2013). If an interpretation of Bolivian law is required, "the court's determination of an issue of foreign law is to be treated as a ruling on a question of law,' not `fact,' so that appellate review will not be narrowly confined to the `clearly erroneous' standard of Rule 52(a)." Advisory committee's note to 1966 adoption of Fed. R. Civ. P. 44.1; *see also Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018) (reasoning that under Rule 44.1 "a federal court should carefully consider a foreign state's views about the meaning of its own laws," but "the appropriate weight in each case will depend upon the circumstances").

Whether the arbitration tribunal's award on the merits has been set aside or suspended is a knotty issue. Not surprisingly, the parties cite almost no American case law to support their positions. That is because the validity of the merits award turns on whether various procedural maneuvers in, and substantive rulings of, Bolivian courts were proper. And Bolivian judicial proceedings on the merits award did

not follow an entirely familiar pattern. In some ways, the proceedings resembled an American interlocutory appeal in which trial court litigation is not stayed. In other ways, they did not.

Although our review of foreign law is de novo, the district court's opinion is instructive. That court concluded the merits award had not been set aside for several reasons. First, the district court reasoned that once the PCT in March 2016 reversed the Guarantee Court's decision on GCC's *amparo* against the Eighth Judge, none of the orders that arose out of the simultaneous remand (and which appeared to sustain the Ninth Judge Decision) had any legal effect. App. at 1251-54; *see also id.* at 1252 (stating that because the March 2016 PCT order "revoked the legal basis for the Ninth Judge Decision, the Ninth Judge Decision cannot be reasonably understood to supersede the Eighth Judge Decision"); *id.* at 1254 (rejecting, with respect to the November 2016 PCT order, GCC's request to "view the Ninth Judge Decision in a vacuum and ignore the significance of' the March 2016 PCT order). Second, the district court determined that the January 2017 PCT order, despite referring to the "subsistence" of the Ninth Judge Decision, served a limited procedural purpose "and could not have given substantive validity to the Ninth Judge Decision after it had been rendered a nullity" by the March 2016 PCT order. *Id.* at 1254-55; *see also id.* at 1254 (noting that GCC sought, but did not receive, a statement in the January 2017 PCT order that "the Ninth Judge Decision was valid and in effect" notwithstanding the March 2016 PCT order). Third, the district court observed that "[t]he expert reports make clear" the President of the PCT had "no legal authority to unilaterally issue" his November 2016 decree. *Id.* at 1255;

see also id. (referencing the "three types of decisions" the PCT is authorized to make under Bolivian law).

After independently reviewing the record, we agree with the district court's analysis. We recognize that the district court's ruling and our ruling insinuate that the November 2016 PCT order, the November 2016 PCT Presidential decree, and the January 2017 PCT order were improvidently issued and/or do not mean that the Ninth Judge Decision remains in effect, even though that is what each order or decree arguably states or implies. No party, however, fits together all of the pieces of the puzzle. In other words, no party provides an explanation which renders consistent and logical all of the twists, turns, and orders in the Bolivian proceedings, at least by standards recognizable to American jurists and litigants. So while CIMSA's interpretation may not be seamless, we are convinced there *is* no perfect explanation of what has happened in Bolivia, and CIMSA's construction is more defensible than the alternative.

A more detailed examination of the evidence and authorities proffered by CIMSA bears this out. Those materials indicate that GCC sought to annul the merits award. App. at 180-81, 381-82. The Eighth Judge denied the request. *Id.* at 18182, 382-83. GCC had no right to appeal that decision. *Id.* at 182-83, 383. GCC's only option was to pursue the "extraordinary remedy" of an *amparo*, which is what GCC did, asserting that the Eighth Judge failed to sufficiently explain her reasoning. *Id.* at 182-83, 383-84. A Guarantee Court agreed with GCC, temporarily revoked the Eighth Judge Decision, and remanded the case to the Eighth Judge to issue a new ruling. *Id.* at 183-84, 384-86. However, the validity of the Guarantee Court's actions was contingent upon further review by the

PCT. *Id.* at 184-85, 384-86. In a March 2016 order, the PCT reversed the Guarantee Court, holding that the Eighth Judge had acted properly. *Id.* at 191-92,387-88,873-74.

In the interim, the Ninth Judge entered the picture. Instead of promptly remanding the matter to the Eighth Judge for a new decision, the Guarantee Court held on to the case for nearly two months, sending it back when the Eighth Judge was on vacation. *Id.* at 185, 390. That resulted in the matter being routed to a substitute judge—the Ninth Judge—who faced a disqualification request from CIMSA and had only approximately a week to review the voluminous record; the Ninth Judge granted GCC's annulment request the day before the Eighth Judge returned from vacation, despite the fact that substitute judges typically do not issue substantive final judgments. *Id.* at 185-86,390-92,899-902. CIMSA filed an *amparo* against the Ninth Judge, which a Guarantee Court granted in February 2016. *Id.* at 189-90,396–97. That led to the case being remanded to the Eighth Judge, with the validity of the actions of the Guarantee Court again being contingent on PCT review. *Id.* at 190.

As indicated, though, roughly a month later, the PCT in GCC's original *amparo* concluded there was no basis to challenge the Eighth Judge's actions in the first place. *Id.* at 191-92,387-88,873-74. That effectively reinstated the merits award as a final and binding judgment. *Id.* at 192, 388-90. Once CIMSA found out about this PCT order, CIMSA reasonably concluded that the reinstatement of the Eighth Judge Decision and the merits award rendered superfluous a separate attack on the Ninth Judge's rulings. *Id.* at 191-92,871. In the words of one of CIMSA's experts, the Ninth Judge Decision had "no legal effect" and was "rendered

void" by the March 2016 PCT order, which "revoked the only legal authority for a new decision on GCC's request for annulment." *Id.* at 393; *accord id.* at 393-96,399–400,869-70,876-79. CIMSA consequently withdrew its *amparo* against the Ninth Judge. *Id.* at 192, 397-98. Even with the withdrawal, a PCT ruled on CIMSA's *amparo* anyway, issuing an order that was backdated almost six months. *Id.* at 192-93, 398-99.

This prompted GCC to file (without notice to CIMSA) requests for "clarification." *Id.* at 193,401,406-07. GCC's clarification requests produced a decree from the President of the PCT regarding GCC's *amparo* and a January 2017 PCT order regarding CIMSA's *amparo* (both of which were issued without notice to CIMSA). *Id.* at 193-94, 402. The presidential decree used language that is difficult to understand, and in any event, the President lacked authority under Bolivian law to issue the order. *Id.* at 195-96,402-06,873,879-80. The President was also one of the signatories of the January 2017 PCT order, which (like the November 2016 PCT order) did not and could not overturn the March 2016 PCT order finalizing the merits award and rejecting GCC's challenge to the Eighth Judge. *Id.* at 196-97, 407-10, 870-71,880-86. Accordingly, we conclude that the merits award has not been set aside or suspended for purposes of the New York Convention.

We also reject GCC's argument that the arbitration tribunal's damages award is not binding because annulment proceedings are pending in Bolivian courts. A court action in the country where the arbitration took place does not create a defense to confirmation. American judges hold—virtually unanimously—that under the New York Convention "[a]n arbitration

award becomes binding when no further recourse may be had to *another arbitral tribunal* (that is, an appeals tribunal)." *Ministry*, 665 F.3d at 1100-01 (emphasis added, citation and internal quotation marks omitted). American judges further hold that "[u]nder the [New York] Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered." *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003) (brackets added).[6]

The rationale for this rule is straightforward. "When the [New York] Convention was drafted, one of its main purposes was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either

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[6] For additional examples of cases holding that the exhaustion of arbitration proceedings makes an award "binding," see *Aperture Software GmbH v. Avocent Huntsville Corp.*, No. 5:14-cv-00211-JHE, 2015 WL 12838967, at *2 (N.D. Ala. Jan. 5, 2015); *Boeing Co. v. KB Yuzhnoye*, No. CV 13-730 ABC (AJWx), 2013 WL 12131183, at *6 (C.D. Cal. Dec. 18, 2013); *Jorf Lasfar Energy Co., S.C.A. v. AMCI Export Corp.*, No. Civ. A. 05-0423, 2006 WL 1228930, at *4 (W.D. Pa. May 5, 2006); *Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.*, No. 95 Civ. 10278 (RPP), 1996 WL 107285, at *4 (S.D.N.Y. Mar. 12, 1996); and *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 957-58 (S.D. Ohio 1981). For more examples of cases holding that enforcement may proceed despite pending judicial proceedings in the country where the arbitration occurred, see *Fakhri v. Marriot Int'l Hotels, Inc.*, 201 F. Supp. 3d 696, 711 n.11 (D. Md. 2016); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. Civ. A. H-09-891, 2011 WL 13131147, at *3 (S.D. Tex. Oct. 12, 2011); *Jorf Lasfar*, 2006 WL 1228930, at *4; and *Alto Mar Girassol v. Lumbermens Mut. Cas. Co.*, No. 04 C 7731, 2005 WL 947126, at *4 (N.D. Ill. Apr. 12, 2005).

confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs." *Id.* at 366-67 (brackets added). 'By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the [New York] Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award." *Id.* at 367 (brackets added); *see also Ingaseosas Int'l Co. v. Aconcagua Investing Ltd.*, 479 F. App'x 955, 961 (11th Cir. 2012) (unpublished) ("It is true that the [New York] Convention envisions multiple proceedings that address the same substantive challenges to an arbitral award.") (citation and internal quotation marks omitted, brackets added).

New York Convention provisions anticipate the possibility of a party seeking confirmation in one country even though nullification proceedings are underway in another. The New York Convention states:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

21 U.S.T. 2157, art. VI. American judges recognize that "a district court faced with a decision whether to adjourn arbitral enforcement proceedings to await the outcome of foreign proceedings must take into account the inherent tension between competing concerns." *Europcar Italia*, *S.p.A. v. Maiellano Tours*, *Inc.*, 156

F.3d 310, 317 (2d Cir. 1998). Factors relevant to the adjournment analysis include, without limitation, (1) the general objective of the arbitration; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) the level of scrutiny and the standard of review in the foreign proceedings; (4) other characteristics of the foreign proceedings; and (5) the balance of possible hardships to each of the parties. *Id.* at 317–18.

GCC elides the distinction between an arbitration and a subsequent judicial challenge by attempting to portray the issue as whether the law of the country where the arbitration took place determines whether an award is binding. The pivotal inquiry under any forum's law is whether the arbitration proceedings have sufficiently run their course, not whether post-arbitration judicial proceedings are available. Courts typically look to the parties' arbitration agreement, the rules governing the arbitration, and other forum laws to decide whether an award is binding. *See*, *e.g.*, *Aperture*, 2015 WL 12838967, at *3 (relying on the parties' contract and arbitration rules); *Fertilizer Corp.*, 517 F. Supp. at 956-58 (relying on the parties' contract, arbitration rules, and the law of the forum). That is logical, because the parties are free to agree on the terms and conditions of their arbitration, as permitted by law. Looking to the rules of the forum in this context is quite different from looking to the law of the forum with respect to judicial nullification options.

Diag Human S.E. v. Czech Republic–Ministry of Health, 907 F.3d 606 (D.C. Cir. 2018), illustrates the point. In that case, the D.C. Circuit affirmed a district court's ruling that an arbitration award was not binding under the New York Convention. *Id.* at 607-12. The D.C. Circuit recognized that the parties, as

permitted by "Czech arbitration law," agreed to "a review process in which a second arbitration panel can revisit the original award with the power to uphold, nullify, or modify it." *Id.* at 608. Citing cases like *Ministry*, 665 F.3d at 1100-01, and *Fertilizer Corp.*, 517 F. Supp. at 958, the D.C. Circuit found not only that "the parties had recourse to another arbitration panel, which was sufficient to prevent the award from becoming binding at that time," but also that the second panel had "invalidated" the award. *Diag*, 907 F.3d at 609. The D.C. Circuit observed that "[w]hen the binding status of an award is in doubt under Article V(1)(e) of the New York Convention, the court may look to the law of the rendering jurisdiction, though litigation of that issue is rare. This is true particularly when the agreement incorporates local arbitral law, as this agreement did here." *Id.* at 611 (citing, among other cases, *Aperture*, 2015 WL 12838967, at *2-3).

In the case before us, the parties' agreement demonstrates that the arbitration award became binding upon issuance for purposes of the New York Convention. The 2005 Shareholder Agreement's "Waiver of Remedies" clause stated that "[a]ny awards or order issued by the Arbitration Court shall be final and of mandatory compliance for the Parties to the Arbitration who expressly waive all actions for annulment, objection, or appeal against the award." Supp. App. at 2. The 2005 Shareholder Agreement also specified the use of IACAC arbitration rules, *id.*, which rules provided that "[t]he award shall be made in writing and shall be final and binding on the parties and subject to no appeal." *See* 22 C.F.R. pt. 194, app. A, art. 29.2 (setting forth the IACAC rules as amended April 1, 2002). Bolivian law may very well permit a judicial challenge to the damages award. That does not detract

from the "binding" nature of the arbitration under the New York Convention.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's orders exercising personal jurisdiction over GCC and confirming the arbitration award under the New York Convention.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed March 25, 2019]

Civil Action No. 1:15-CV-02120

COMPAÑÍA DE INVERSIONES MERCANTILES S.A.,

Petitioner,

v.

GRUPO CEMENTOS DE CHIHUAHUA, S.A.B. DE C.V.,
and GCC Latinoamérica, S.A. DE C.V.,

Respondents.

MEMORANDUM OPINION AND ORDER

Kane, J.

Petitioner Compafiía de Inversiones Mercantiles S.A. ("CIMSA") brought this action in 2015 pursuant to 9 U.S.C. § 207 to confirm a foreign arbitral award issued against Respondents Grupo Cementos de Chihuahua, S.A.B. de C.V. ("GCC") and GCC Latinoamérica, S.A. de C.V. ("GCC Latinoamérica") in Bolivia. The resolution of this case has been prolonged by ongoing litigation in Bolivia and obstacles to effectuating service. In October 2018, I authorized alternative service and Respondents were promptly served. (*See* ECF Nos. 79 and 81). On December 12, 2018, I rejected Respondents' challenges to jurisdiction and ordered the parties to present oral argument on the merits of CIMSA's Petition. (*See* ECF No. 82). Having considered the parties' oral arguments,

presented on February 13, 2019, and the voluminous filings and arguments contained therein, I now grant CIMSA's Petition to Confirm a Foreign Arbitral Award (ECF No. 1) and the subsequent Motion to Confirm Foreign Arbitral Award (ECF No. 50).

I. BACKGROUND

A. The Parties' Contractual Relationship and Arbitration Proceedings in Bolivia

Contractual Agreements and Negotiations

GCC, a Mexican corporation with its principal place of business in Chihuahua, Mexico, "is a leading supplier of cement, aggregates, concrete and construction-related services in Mexico and the United States." (Hertzberg Decl. ¶ 2, ECF No. 1-10; GCC's 2Q2015 Earnings Report, ECF No. 1-11). In the early-2000s, GCC began "exploring the possibility of expanding" its business into the southern hemisphere. (Hertzberg Decl. ¶ 2; Amaya Decl. ¶ 5, ECF No. 62). In 2004, GCC representatives traveled to La Paz, Bolivia to meet with representatives from Sociedad Boliviana de Cemento, S.A. ("SOBOCE"), Bolivia's largest cement company. (Doria Medina Decl. ¶ 2, ECF No. 1-9; Amaya Decl. ¶ 6). Later that same year, GCC representatives mentioned to SOBOCE representatives that GCC "was interested in growth opportunities in South America." (Amaya Decl. ¶ 7). SOBOCE representatives informed the GCC representatives that CIMSA, a Bolivian corporation with its principal place of business in Bolivia, "was searching for a new partner to invest in SOBOCE." (*Id.*). At the time, CIMSA owned a controlling interest in SOBOCE. (Hertzberg Decl. ¶ 3).

In 2005, representatives from GCC and CIMSA met in Miami, Florida to discuss GCC's "potential interest

in acquiring shares in SOBOCE." (Doria Medina Decl. ¶ 5). The parties engaged in extensive negotiations over the next six months, and on September 22, 2005, GCC Latinoamérica, GCC's wholly-owned subsidiary, acquired a 47 percent interest in SOBOCE. (Hertzberg Decl. ¶ 3). The same day, GCC, GCC Latinoamérica, SOBOCE, and CIMSA executed a shareholder's agreement (the "2005 Agreement") governed by Bolivian law. (Amaya Decl. ¶ 20). GCC guaranteed GCC Latinoamérica's obligations under the 2005 Agreement. (Hertzberg Decl. ¶ 3).

The 2005 Agreement provided, among other things, that each party had a right of first refusal with respect to the other's shares in SOBOCE. (Doria Medina Decl. ¶ 10). Under the agreement, either party could "transfer its shares to a third party after a period of five years." (*Id.*). However, the party wishing to transfer its shares could only do so after providing notice and "afford[ing] the other party an opportunity to purchase the shares on the same or better terms within 30 days." (*Id.*). The 2005 Agreement also provided that any dispute between the parties would be "submitted to conciliation and subsequent international arbitration for final resolution, subject to the rules of the Inter-American Commercial Arbitration Commission (IACAC)," known as the Comisión Inter-Americana de Arbitraje Comercial ("CIAC") in Spanish, "and as modified by means of mutual agreement between the Parties to the Arbitration." (2005 Agreement, cl. 29.1, ECF Nos. 62-1 & 62-2). Under the Agreement, the arbitration was to be administered by the national chapter of the CIAC in Bolivia. (*Id.*)

In 2009, Respondents informed CIMSA of their desire to sell their SOBOCE shares. (Amaya Decl. ¶ 24). Pursuant to CIMSA's right of first refusal under

the 2005 Agreement, the parties met in Miami six different times in 2010 to negotiate an agreement that would allow CIMSA to purchase Respondents' shares in SOBOCE. The parties "came to an agreement regarding fundamental terms of sale" and signed an agreement in La Paz, Bolivia the following month. (*Id.*). However, the Government of Bolivia "expropriated a substantial division of SOBOCE's business" shortly before the transaction was scheduled to close. (Doria Medina Decl. ¶ 15). As a result, CIMSA was unable to pay for Respondents' shares under the terms of the new agreement, and the parties failed to close the deal. (*Id.*; Amaya Decl. ¶ 29).

In 2011, the parties met in Houston, Texas to negotiate another agreement under which CIMSA would purchase Respondents' SOBOCE shares pursuant to its right of first refusal under the 2005 Agreement. (Doria Medina Decl. ¶ 16; Amaya Decl. ¶¶ 31-32). During the meeting, CIMSA proposed "two alternative payment structures." (Doria Medina Decl. ¶ 18). Negotiations continued via telephone and email for several weeks, but the parties ultimately agreed on one of the payment terms CIMSA proposed. (*Id.* ¶¶ 19-22). In August 2011, Respondents "instructed CIMSA to hire New York counsel to draft a final agreement." (*Id.* at ¶ 22). Respondents also retained their own counsel from a New York-based law firm, and the parties agreed that New York law would govern the new agreement. (*Id.*). Nevertheless, Respondents proceeded to sell their SOBOCE shares to a third party on August 18, 2011, despite previous indications that the payment term CIMSA suggested at the 2011 meeting was satisfactory. (Doria Medina Decl. ¶ 26; Amaya Decl. ¶¶ 39-41).

Arbitration Proceedings

In response, CIMSA submitted a notice of arbitration to the CIAC against Respondents in Bolivia, and the parties appointed their chosen arbitrators (the "Arbitral Tribunal" or "Tribunal"). (Doria Medina Decl. ¶¶ 27-28). The parties agreed to bifurcate the proceedings into two phases: a phase to determine liability ("Merits Phase"), and a phase to determine damages ("Damages Phase"). (Von Borries Decl. ¶ 15).

On September 13, 2013, the Arbitral Tribunal issued a "Partial Final Award on Liability" (the "Merits Award") in favor of CIMSA. (Merits Award, ECF No. 46-2; Von Borries Decl. ¶¶ 16-18). The Merits Award concluded that Respondents violated "the requirements of good faith as stipulated by Bolivian law and the obligations emanating from subclause 6.3 of the 2005 Agreement," and ruled to move on to the second stage where it would "quantify the damages to be paid to CIMSA by the Respondents." (Merits Award ¶ 595, p. 158).

On April 10, 2015, the Arbitral Tribunal issued a Final Award on Damages (the "Damages Award"). (Damages Award, ECF No. 1-8). The Tribunal quantified CIMSA's damages at approximately $34.1 million, plus fees and costs, totaling $36,139,223, plus annual interest at a rate of 6%. (*Id.* ¶ 377, p. 90). The Respondents submitted a request for interpretation and correction of the Damages Award asking the Tribunal to amend its damages calculation. The Tribunal rejected the request and confirmed its damages calculation in its June 2015 Decision on the Interpretation and Correction of the Final Arbitral Award on Damages. (Decision on Interpretation of the Damages Award, ECF No. 1-8, pp. 94-116).

Respondents initiated court proceedings in Bolivia seeking to annul both the Merits Award and the Damages Award, as detailed below.

B. Post-Arbitration Legal Proceedings in Bolivia

The various legal proceedings in Bolivia are detailed in the parties' filings (*See* ECF Nos. 50, 61, 64, 65, 69, 71, 73, 76, 77, & 78), so here I outline only those events most pertinent to my analysis and decision.

Bolivian Proceedings Regarding the Merits Award

In November 2013, two months after the Arbitral Tribunal issued the Merits Award, and shortly after the Tribunal commenced the Damages Phase of the arbitration, Respondents filed a request for annulment of the Merits Award, which, pursuant to the law at the time, was first submitted to the Arbitral Tribunal for initial review. (Von Borries Decl. ¶ 32, ECF No. 46). In February 2014, the Tribunal found that the request satisfied the technical requirements and could proceed to the Bolivian courts to decide the merits of the request. (*Id.* ¶ 33).[1] The request for annulment was assigned to the Eighth Judge for the

[1] Although the Tribunal gave Respondents two weeks to seek suspension of the Damages Phase pending the court's decision on the request for annulment of the Merits Award, they never requested suspension of the arbitration proceedings in Bolivia. (*Id.* ¶¶ 33-34). Instead, months later in December 2014, they obtained an *ex parte* anti-arbitration injunction from a court in Chihuahua, Mexico, ordering suspension of the Damages Phase of the arbitration proceedings. (*Id.* ¶ 34). The Arbitral Tribunal considered the parties' arguments on the Mexican court's anti-arbitration injunction, but concluded that the Mexican court did not have jurisdiction to interfere with the arbitration in Bolivia. (*Id.* ¶¶ 35-37).

Civil and Commercial Court of the Judicial District of La Paz, Dr. Rosario Sánchez Sánchez. On August 31, 2015, the Eighth Judge denied Respondents' request for annulment of the Merits Award. ("Eighth Judge Decision," No. 362/2015, ECF No. 65-4).

Bolivian law does not permit parties to appeal a trial court decision in an action to set aside an arbitral award. Under Bolivian Law No. 1770 (the "Old Arbitration Law"), a request for annulment is the exclusive remedy for a party seeking relief from an arbitral award, and there is no appeal from the trial court's decision on a request to annual an arbitral award. (Von Borries Decl. ¶¶ 32, 43; Asbun Report ¶ 15, ECF No. 49-1).[2] However, if a judge violates a party's constitutional rights during the proceedings or in the decision, the party may bring an *amparo* action pursuant to Article 128 of the Bolivian Constitution and Law No. 254 of the Bolivian Code of Constitutional Procedure. (Asbun Report ¶17, ECF No. 49-1; Von Borries Decl. ¶ 43). An *amparo* is not an appeal of the substantive merits of the underlying claim, but is a distinct action to address official conduct that violates

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[2] The Old Arbitration Law was replaced with Law No. 708 (the "New Arbitration Law") on June 25, 2015, but the Old Arbitration Law continued to apply to all proceedings commenced prior to its enactment, including Respondents' challenge to the Merits Award. (Von Borries Decl. ¶ 32, n. 2, p. 12). The New Arbitration Law applies to the annulment proceedings on the Damages Award, which Respondents initiated in July 2015. Like the Old Arbitration Law, the New Arbitration Law provides that the only way to challenge an arbitral award is to request that the Bolivian trial court annul the award, and the court's resolution of this request is not appealable. (Asbun Report ¶ 15; *see also* Andrés Moreno Gutierrez & Daniel Arredondo Zelada, Bolivia, GLOBAL ARBITRATION REV., Sept. 4, 2017, *available at* https://globalarbi trationreview.com/chapter/1147054/bolivia).

a party's constitutional rights. (*See* Asbun Report ¶ 19).

Respondents filed an *amparo* against the Eighth Judge, alleging that she violated its rights by, *inter alia*, failing to sufficiently explain her decision. *Amparos* are initially heard by departmental courts, called "Guarantee Courts" when acting on *amparos*, and the resolution of the Guarantee Court is subject to review by the Plurinational Constitutional Tribunal ("PCT"), the highest constitutional court in Bolivia. Although a Guarantee Court's resolution on an *amparo* is subject to mandatory review by the PCT, it is also subject to immediate compliance. Under this simultaneous process of remand and review, after a Guarantee Court grants an *amparo*, the case is sent to the PCT for review *and also* sent back to the trial court for compliance with the Guarantee Court's resolution. (Asbun Report ¶¶ 22-23; Von Borries Decl. ¶¶ 47-48).

On October 28, 2015, a Guarantee Court granted Respondents' *amparo* and revoked the Eighth Judge Decision. (Guarantee Court Resolution No. 77/2015, ECF No. 65-6). The Guarantee Court remanded the case "so that the Eighth [ ] Judge may issue a new decision with proper statement of grounds according to the principle of consistency." (*Id.* at 17). Rather than send the case back to the Eighth Civil and Commercial Court right away, the Guarantee Court waited more than two months and sent the case back on Friday, January 8, 2016, when the Eighth Judge was away on a planned two-week long vacation (from January 4, 2016 through and including Monday, January 18, 2016). (Von Borries Decl. ¶ 49).

The Ninth Judge of the Civil and Commercial Court, Fabiano Cristiam Chui Torrez, was assigned to monitor the Eighth Judge's docket while she was away. On

Monday, January 11, 2016, the next business day after the Guarantee Court remitted the case to the Eighth Civil and Commercial Court, Respondents moved the Ninth Judge, who was covering, for a decision on its request for annulment. (*Id.* ¶¶ 49-50). The next day, CIMSA filed a petition to disqualify the Ninth Judge. On January 15, 2016, the Ninth Judge dismissed CIMSA's petition for disqualification, and his decision to reject the motion to disqualify was transferred to the Second Civil Chamber of the Departmental Court of Justice of La Paz for review. (Asbun Report ¶ 41).

On January 18, 2016, while the disqualification matter was still pending before the Second Civil Chamber, the Ninth Judge granted Respondents' request for annulment of the Merits Award.[3] ("Ninth Judge Decision," No. 13/2016, ECF No. 65-12). The Ninth Judge issued his decision just one week after receiving the case file, which he acknowledged was sent for ruling on January 12, 2016 (*see id.* at 4), and one day before the Eighth Judge was due to resume duties.

CIMSA filed an *amparo* against the Ninth Judge on February 6, 2016, alleging, *inter alia*, that the Ninth Judge Decision violated CIMSA's due process rights. (Von Borries Decl. ¶59). On February 22, 2016, a Guarantee Court granted CIMSA's *amparo*, overturned the Ninth Judge Decision, and remanded the case to the Eighth Judge. (*Id.* ¶¶ 60-61). Consistent with the standard procedure, the Guarantee Court's

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[3] The Second Civil Chamber ultimately rejected CIMSA's motion to recuse on February 23, 2016, more than a month after the Ninth Judge had already issued his decision on Respondents' request for annulment. (*See* Second Civil Chamber Resolution No. R-58116, ECF No. 65-10).

resolution granting CIMSA's *amparo* was simultaneously sent to the PCT for mandatory review. (*Id.*)

While the CIMSA *amparo* against the Ninth Judge was pending PCT review, the PCT issued a decision on Respondents' *amparo* against the Eighth Judge. On March 16, 2016, the PCT issued a final decision, No. 0337/2016, that revoked Guarantee Court Resolution No. 77/2015 and rejected the Respondents' *amparo* against the Eighth Judge. ("PCT Revocation Order," ECF No. 65-14). Specifically, the PCT decided "TO REVOKE [Guarantee Court Resolution No. 77/2015 dated] October 28, and, accordingly, TO DENY the protection sought" by Respondents in their *amparo*.[4] (*Id.* p. 18). CIMSA maintains that this decision, from the highest constitutional court in Bolivia, reinstated the Eighth Judge Decision and made it legally valid and binding.

CIMSA withdrew its *amparo* against the Ninth Judge Decision after learning of the PCT Revocation Order. (Von Borries Decl. ¶ 65). According to CIMSA, it withdrew its *amparo* in September 2016 because it understood the PCT Revocation Order to nullify the Ninth Judge's jurisdiction and eliminate any need for constitutional relief. (*Id.*)

On November 21, 2016, after CIMSA withdrew its *amparo*, the parties were notified of PCT Procedural Order No. 581/2016, dated May 23, 2016. ("PCT Procedural Order," ECF No. 65-16). The PCT Procedural Order revoked Guarantee Court Resolution No. 04/2016, which had granted CIMSA's *amparo* against

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[4] As the PCT acknowledged, Respondents' *amparo* action sought an order setting aside the Eighth Judge Decision and ordering the judge a quo to issue a new decision. (*See* PCT Revocation Order No. 0337/2016 ¶ I.1.3, p. 3).

the Ninth Judge. The PCT concluded that it could not "review the work of interpretation . . . of other courts . . . except when it is explained why the interpretive work is arbitrary, and the causal connection is established." (*Id.* p. 10). Because CIMSA had not claimed a violation of the principle of legality or established its causal connection with the right to due process, the PCT ruled that it could not review the merits of the Ninth Judge Decision and that the Guarantee Court "did not carry out an adequate verification of the background information" when it addressed the merits and granted the *amparo*. (*Id.* pp. 10-11). The PCT emphasized that it did not examine the merits of the case and that CIMSA was entitled to refile its *amparo* action against the Ninth Judge. (*Id.*; *see also* Von Borries Decl. ¶ 67). CIMSA asserts that it did not refile its *amparo* because, having already tried to withdraw its original *amparo* in light of the PCT Revocation Order, it had no reason to seek relief from the Ninth Judge Decision, which it deemed to be invalid. (Von Borries Decl. ¶ 67).

On November 24, 2016, Respondents filed an *ex parte* request to the PCT seeking clarification of the PCT Procedural Order. PCT Clarification Order No. 004/2017, dated January 27, 2017, stated that because the PCT Procedural Order did not reach the merits of the CIMSA *amparo*, and therefore did not address the validity or invalidity of the Ninth Judge Decision, the Ninth Judge Decision "remains in effect," or "subsists,"[5] in relation to the Procedural Order. ("PCT

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[5] The parties dispute the appropriate translation and meaning of this statement. Respondents contend that it unambiguously upholds the Ninth Judge Decision and declares that it remains in effect. CIMSA, however, argues that "remains in effect" should be more accurately understood to mean "subsists." "In other words,"

Clarification Order," ECF No. 65-20). Notably, although Respondents had asked the PCT to expressly state that the Ninth Judge Decision was not modified by the effects of the PCT Revocation Order, the PCT Clarification Order included no such declaration. It did not speak to the substantive validity of the Ninth Judge Decision in light of the PCT's revocation of the Guarantee Court resolution from which the Ninth Judge Decision originated.

In August 2016, Respondents requested clarification and amendment of the PCT Revocation Order from the president of the PCT, Juan Oswaldo Valencia Alvarado. The president of the PCT then issued a "decree" effectively stating that although the Guarantee Court's resolution is no longer valid (because the PCT Revocation Order revoked it), the legal acts arising out of it—that is, the Ninth Judge Decision—remain effective. ("President's Decree," ECF No. 65-18; *see also* Asbun Report ¶ 76). The validity of the President's Decree is discussed below, but the circumstances surrounding the decree and the PCT Clarification Order should be mentioned here. The PCT president authored both the President's Decree and the Clarification Order (acting in his role as a judge). And while the decree is dated November 25, 2016, and the Clarification Order dated January 27, 2017, the documents were not placed in the case file until December 29, 2017—the last day of Juan Oswaldo Valencia Alvarado's term as PCT president. (*See*

CIMSA argues, "because the PCT Procedural Order did not evaluate the validity of the Ninth Judge Decision, the PCT Procedural Order could not revoke the Ninth Judge Decision." (Pet'r Reply at 49, ECF No. 73).

Asbun Report ¶¶ 74, 76, 83, 84, 91, & 92; Von Borries Decl. ¶¶ 72, 73, 76, & 78).

Bolivian Proceedings Regarding the Damages Award

In July 2015, two months after the Arbitral Tribunal issued the Damages Award, Respondents filed a request to annul it. The request for annulment was assigned to the Twelfth Judge of the Civil and Commercial Court, Karina Erika Valdez Cuba. In a decision dated October 9, 2015, the Twelfth Judge granted Respondents' request and annulled the Damages Award. (Twelfth Judge Decision No. 154/2015, ECF No. 65-36). The Twelfth Judge accepted two out of five proposed grounds for annulment, concluding that the Arbitral Tribunal had breached Respondents' right to a defense and right to due process by (1) relying on an exhibit that had been accepted into evidence during the Merits Phase, but that was not presented or recognized to be evidence under consideration during the Damages Phase; and (2) relying on its own "experience" in valuing CIMSA's damages. (*See id.* pp. 15-20; Rivera Decl. ¶ 54; Von Borries Decl. ¶ 90). The Twelfth Judge ordered the arbitration panel to issue a new award consistent with her ruling. (Twelfth Judge Decision No. 154/2015 p. 23).

CIMSA then sought an *amparo* from the PCT, "arguing that the Twelfth Judge had violated its due process rights by improperly acting as a court of appeal and reopening the evidentiary phase of the arbitration." (Von Borries Decl. ¶ 92). A Guarantee Court rejected CIMSA's *amparo*, but upon final review the PCT revoked the Guarantee Court's decision and vacated the Twelfth Judge's annulment order. (PCT Judgment 1481/2016-S3, issued Dec. 16, 2016, ECF No. 65-38). The PCT ordered the Twelfth Judge to

issue a new decision on the request to annul the Damages Award consistent with its order. (*Id.*).

On April 19, 2017, while the damages annulment proceedings were pending before the Twelfth Judge, Respondents commenced a collateral action challenging the applicable arbitration law. (Von Borries Reply Decl. ¶ 42, ECF No. 71). The Twelfth Judge suspended her consideration of Respondents' request to annul the Damages Award while the PCT considered the unconstitutionality action. (*Id.*). In March 2018, the PCT rejected Respondents' constitutional challenge to the arbitration law and sent the case file back to the Twelfth Judge to issue a new decision on the request for annulment of the Damages Award. (*See id.* ¶¶ 43-44; Rivera Reply Decl. ¶ 45, ECF No. 76).

On July 27, 2018, while the Twelfth Judge was considering the request to annul the Damages Award on remand, Respondents filed a petition asserting that the Twelfth Judge lacked jurisdiction to rule on the Damages Award because it was effectively nullified by the alleged annulment of the Merits Award. (Oral Argument Tr. at 32:8-18; 35:9-16, ECF No. 92). The Twelfth Judge must rule on Respondents' July 2018 petition before deciding the request for annulment of the Damages Award. (*Id.* at 32:25-33:5).

The Twelfth Judge may decide that she is not qualified to rule on whether the Merits Award was actually annulled, in which case it is unclear whether she would then issue a decision on the Damages Award notwithstanding Respondents' July 2018 petition. (*See id.* at 83:18-21). If she rejects Respondents' July 2018 petition and decides that she does have jurisdiction to consider the Damages Award (because it was not nullified by the alleged annulment of the Merits Award), she will have approximately 30 days to

issue a decision on the request for annulment of the Damages Award, consistent with the PCT Damages Order that remanded the case. (*See id*. at 37:3-8). Regardless of how the Twelfth Judge rules on Respondents' July 2018 petition or the request for annulment of the Damages Award, the losing party will likely seek an *amparo*. (*See id.* at 83:21-84:3).

II. LEGAL STANDARD

CIMSA brings this action to confirm a foreign arbitral award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), codified at 9 U.S.C. § 201 *et seq*. When a party to a foreign arbitration moves to confirm an award under the New York Convention, the district court must "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention." 9 U.S.C. § 207. The seven exclusive grounds upon which courts may refuse to confirm an award are specified in Article V of the New York Convention.[6] "Courts construe these

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[6] Article V of the New York Convention in full provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the

defenses narrowly, to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *CEEG (Shanghai) Solar Science & Technology Co., Ltd v. LUMOS LLC*, 829 F.3d 1201, 1206 (10th Cir. 2016) (internal quotations omitted). The party opposing enforcement of the arbitral award has the burden of proving that one of

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> arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention art. V(1)-(2).

the defenses applies. *Id.* "[This] burden is a heavy one, as the showing required to avoid summary confirmance is high." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (internal quotations omitted).

As relevant here, Article V(1)(e) provides that a court may refuse to enforce an arbitral award if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e). While deference must generally be afforded to the decision of a competent authority in the primary jurisdiction, there is a narrow exception to this rule when "the foreign judgment setting aside the award is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought' . . . or violated 'basic notions of justice.'" *Thai-Lao Lignite Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, 997 F.Supp.2d 214, 223 (S.D.N.Y. 2014), aff'd 864 F.3d 172 (2nd Cir. 2017) (quoting *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007)).

III. ANALYSIS

CIMSA contends that Respondents cannot establish a defense to confirmation with respect to the Merits Award because it was not effectively annulled in Bolivia. (*See* Pet'r Reply at 41-59, ECF No. 73). They further argue that even if the Ninth Judge Decision could be understood to annul the Merits Award, it was so "tainted with judicial misconduct [that it] should not be recognized." (Pet'r Reply at 50). Meanwhile, Respondents assert that the Merits Award has been lawfully set aside by a competent authority in Bolivia, and they argue that the judicial corruption alleged by

CIMSA does not "warrant ignoring the decisions of the courts of the primary jurisdiction." (Resp. at 41, ECF No. 61).

With respect to the Damages Award, CIMSA contends that Respondents have no defense to confirmation because the Damages Award has not been set aside in Bolivia and is binding under the New York Convention. (Pet'r Reply at 36-38). Respondents do not dispute that the Damages Award has not yet been aside, but they argue that the Damages Award is not binding under Bolivian law. Respondents argue that if I will not dismiss CIMSA's Petition, I should exercise my discretion under Article VI of the New York Convention to stay the case pending resolution of their request to annul the Damages Award in Bolivia. (Resp. at 59-60).

A. Whether the Merits Award Has Been Set Aside

The Impact of the PCT Revocation Order on the Ninth Judge Decision

The status of the Merits Award depends on the legal validity and current effect of the Ninth Judge Decision, which the parties debate. CIMSA has presented a strong case that the PCT Revocation Order (which upheld the Eighth Judge Decision and rejected Respondents' *amparo*) rendered the Ninth Judge Decision null and void. The origin of the Ninth Judge Decision—the Guarantee Court's remand order—was ultimately revoked by the PCT. As Dr. Jorge Asbun, an expert on Bolivian constitutional law, explains, "the default rule, as mandated by the Constitution and the Constitutional Procedural Code, is that when a Guarantee Court resolution is revoked, both the resolution itself as well as any acts based upon it are

rendered without effect."[7] (Asbun Reply ¶ 29, ECF No. 69-2). Indeed, it would be illogical for actions arising out of a Guarantee Court's resolution to remain binding if the PCT ultimately overturns the resolution. (*See* Asbun Report ¶¶ 47-51, ECF No. 49-1). This would render the PCT's review meaningless. (*Id.* ¶ 50). Accordingly, the Ninth Judge Decision "would only operate to override the Eighth Judge Decision if the PCT had affirmed the Guarantee Court's" remand order. (*Id.* ¶ 54). Because the PCT Revocation Order revoked the legal basis for the Ninth Judge Decision, the Ninth Judge Decision cannot be reasonably understood to supersede the Eighth Judge Decision. (*See id.*)

The expert report of Mr. Andaluz, submitted by Respondents, does not convincingly refute this. Mr. Andaluz states that the PCT Revocation Order could not revoke the Ninth Judge Decision because Respondents' *amparo* was against the Eighth Judge, not the Ninth Judge. (Andaluz Report ¶ 75.2, p. 64, ECF No. 64-2). This argument completely ignores the context in which the Ninth Judge Decision arose.[8] Far more compelling is Dr. Asbun's conclusion that because the "Ninth Judge Decision arose in the proceedings on [Respondents'] *amparo* . . . the final decision in those

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[7] Dr. Asbun cites to PCT precedent supporting this rule. For example, the PCT has recognized that "the obvious consequence of the revocation of the decision granting the *amparo*, is that things return to their previous state, or as they were before the *amparo* decision from the Guarantee Judge or *amparo* was complied with." (Asbun Reply ¶ 19, ECF No. 69-2) (citing SCP 98/2004-R, issued Jan. 21, 2004).

[8] While I do not take issue with Mr. Andaluz's qualifications or his general credibility as an expert on arbitration, his reports include opinions on Bolivian law that are often vague, noncommittal, and unpersuasive.

proceedings, [the PCT Revocation Order,] bears directly on its validity." (Asbun Reply p. 2).

Respondents have likewise failed to establish their alternative argument—that the PCT Revocation Order could only render the Ninth Judge Decision invalid if it expressly stated that it did so. (*See* Resp. at 43). Dr. Asbun asserts that, contrary to Respondents' contention, Bolivian law recognizes the basic principle that the PCT's revocation of a Guarantee Court resolution also revokes any decisions emanating from it. (Asbun Reply ¶ 18). Because this is the default rule, established in Articles 129.IV and 202.6 of the Political Constitution of the State and Articles 38 *et seq.* of the Constitutional Procedural Code, the PCT need not make an express pronouncement of the effect of its revocation order unless it intends to make an exception and deviate from the default rule. (*Id.*). Mr. Andaluz does not dispute that this is a default basic principle in Bolivian law. He merely states that "[i]f the [PCT Revocation Order] would have revoked the [Ninth Judge Decision], it would have said so, because the [Revocation Order] is dated March 16, 2016, two months after the [Ninth Judge Decision] was issued (January 18, 2016)." (Andaluz Report ¶ 75.1). This is unconvincing.

The Effect of the PCT Procedural Order

Respondents point to the PCT Procedural Order as evidence of the validity of the Ninth Judge Decision. They claim that the only way for CIMSA to nullify the Ninth Judge Decision was to have it revoked through an *amparo*. (*See* Resp't Reply at 46, ECF No. 78). According to Respondents, the PCT Procedural Order, which dismissed CIMSA's *amparo* against the Ninth Judge, "affirmed the [Ninth Judge Decision's] continued vitality." (*Id.*). But, as CIMSA is quick to

point out, Respondents' characterization of the PCT Procedural Order and focus on the outcome of CIMSA's *amparo* "is misplaced." (Pet'r Reply at 47). CIMSA argues that the outcome of its *amparo* against the Ninth Judge no longer mattered once the PCT Revocation Order rendered the Ninth Judge Decision a nullity, hence why CIMSA withdrew its *amparo* after learning of the PCT Revocation Order. (*Id.*).

In asserting that the PCT Procedural Order gave substantive validity to the Ninth Judge Decision, Respondents ask the Court to view the Ninth Judge Decision in a vacuum and ignore the significance of the PCT Revocation Order. Dr. Asbun explains that "the judges of the PCT are only authorized to decide the specific questions presented within the particular constitutional action before them." (Asbun Reply ¶ 26). Therefore, the PCT Procedural Order only decided the procedural validity of the Ninth Judge Decision for purposes of the proceedings relating to CIMSA's *amparo*, and it could not have decided the substantive validity of the Ninth Judge Decision in relation to the PCT Revocation Order. (*Id.*).

<u>The Effect of the PCT Clarification Order</u>

Respondents rely on the statement in the PCT Clarification Order that the Ninth Judge Decision "subsists." (*See* Resp't Reply at 47). However, as CIMSA emphasizes, the PCT Clarification Order did not provide the substantive declaration Respondents sought: a declaration that the Ninth Judge Decision was valid and in effect notwithstanding the PCT Revocation Order. (*See* Pet'r Reply at 43; PCT Clarification Order No. 004/2017). Dr. Asbun explains that the term "subsistence," when understood in the context of that particular proceeding, must relate to the impact of the PCT Procedural Order on the Ninth Judge Decision,

not the validity of the Ninth Judge Decision writ large. (*See* Asbun Reply ¶¶ 30-31). I find compelling Dr. Asbun's statement that "clarificatory decisions, such as the PCT Clarification Order, may only refer to the particular decision they purport to clarify and cannot address decisions issued in different proceedings." (*Id.* ¶ 35). Thus, the PCT Clarification Order served a limited purpose and could not have given substantive validity to the Ninth Judge Decision after it had been rendered a nullity by the PCT Revocation Order.

The Effect of the President's Decree

Without providing any basis for accepting the purported legality of the President's Decree, Respondents argue that it "confirms [the Ninth Judge Decision's] continued validity." (Resp. at 44). The circumstances surrounding the President's Decree, described in the Background section above, are unusual to say the least. However, I need not dissect these troubling circumstances or give the President's Decree more attention than it warrants. The expert reports make clear that the President of the PCT has no legal authority to unilaterally issue such a decree. Bolivian law authorizes the PCT to issue only three types of decisions ("decrees" are not among them), which must be issued by the full PCT or a duly constituted chamber of the PCT. (Asbun Report ¶¶ 78-80). The PCT President issued the decree on his own, not collectively as part of a PCT chamber, and the document includes no official PCT docket number or recognized decision type. (*Id.* ¶¶ 81-82). Notably, Mr. Andaluz dances around the legality of the President's Decree, never directly attesting to its validity. (Andaluz Report ¶ 75.7). Instead, he hedges that *if* the President's Decree lacks validity, CIMSA should have challenged it. (*See id.*). I agree with CIMSA that the

President's Decree has no legal value and no bearing on the alleged validity of the Ninth Judge Decision.

Therefore, I find that the Merits Award has not been set aside by a competent authority in Bolivia. The Eighth Judge Decision denied Respondents' request to annul the Merits Award, and that decision was ultimately confirmed by the PCT. Neither the Ninth Judge Decision nor the procedural and technical PCT orders undermine that result. Because Respondents have not demonstrated that the Merits Award has been set aside by a competent authority in Bolivia, I need not address CIMSA's alternative argument that I should not recognize the Ninth Judge Decision even if it did effectively annul the Merits Award.[9]

B. Whether the Damages Award is Binding

A court may refuse to enforce an arbitral award under the New York Convention if the award "has not yet become binding on the parties." New York Convention art. V(1)(e). As I concluded above, Respondents had no further recourse with respect to the Arbitral Tribunal's liability finding once the Eighth Judge Decision rejected their request to annul the Merits Award.[10] Thus, the Merits Award is binding and has

[9] I note that even if the effect of the PCT Revocation Order on the Ninth Judge Decision were in doubt, I would question the legitimacy of the Ninth Judge Decision given the evidence of potential misconduct. For instance, I cannot fathom how he could have reviewed the 30,000 page record, analyzed the parties' arguments, and written a thoughtful and well-reasoned decision in one week. (*See* Von Borries Decl. ¶ 54). Had his decision somehow survived the PCT Revocation Order, it would, for many reasons, remain suspect.

[10] Under both the Old Arbitration Law and the New Arbitration Law, the only way to challenge an arbitral award in Bolivia is to request that the court annul the award, and the

the effect of res judicata.[11] The binding nature of the Damages Award, however, is more difficult to determine.

Respondents contend that as long as their request to annul the Damages Award is pending in Bolivian court, the award is not final and binding under Bolivian law. (Resp. at 60). First, they argue that in Bolivia, a "writ of execution is required to prove the validity of the arbitration award." (Oral Argument Tr. at 33:11-13). Yet reputable sources indicate that the New Arbitration Law, which applies to the challenge against the Damages Award, only requires a writ of execution to prove enforceability in the case of *foreign* arbitral awards. *See* Gutierrez & Zelada, *supra* note 2 (explaining that Article 122 of the New Arbitration Law lists the grounds for refusing to recognize and enforce a foreign arbitral award, including the absence of enforceability due to the lack of a writ of execution). Supporting this conclusion is the fact that the lack of a writ of execution is *not* one of the exclusive grounds for annulling an arbitration award made in Bolivia pursuant to Article 112 of the New Arbitration Law. (*See* PCT Judgment 1481/2016-S3 § III.3, p. 16, ECF No.65-38).

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court's resolution of this request is not appealable. *See supra* note 2.

[11] Article 60 of the Old Arbitration Law, which applies to the Merits Award, states: "The award shall have the effect of a judicial judgment with the normative authority of res judicata and its binding effect shall be obligatory and inexcusable from the time that notices served on the parties accompanied by a resolution that would so state its binding and res judicata effect." THE FORDHAM PAPERS 2011, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 149 (Arthur W. Rovine, ed., Martinus Nijhoff Publishers 2012).

Respondents' next argument is that under Bolivian arbitration law, an arbitral award is only enforceable once a Bolivian court has ruled on (and denied) a request for annulment. (*See* Resp't Reply at 62). However, the expert report of Mr. Andaluz on which Respondents rely only states that *under the Old Arbitration Law*, an award must be expressly declared enforceable by a court following the resolution of a request for annulment made against it. (Andaluz Report ¶ 78).[12] Because Respondents have not provided the full text in Spanish or in English of either the Old or the New Arbitration Law, I am left in the dark as to whether Mr. Andaluz's characterization of these provisions is accurate and whether they also appear in the New Arbitration Law. But even assuming they do, these provisions would only dictate what a party must do to enforce an award in Bolivia—they do not speak to the finality or binding nature of an award in any context beyond enforcing an award domestically. And here, although the parties agreed that Bolivian law would apply to the *arbitration proceedings*, CIMSA is not seeking recognition or enforcement of the award in Bolivia. CIMSA moves to enforce the award in the U.S. pursuant to the New York Convention, and under the New York Convention, the existence of ongoing judicial proceedings in Bolivia is not a defense to enforcement.[13]

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[12] Paragraph 78 of the Andaluz Report states, "As it is known, for an award to be final, the motion for annulment against it (1) must have been accepted or declared inadmissible (Article 60.I of Law 1770); and, (2) it must have been declared enforceable by an express resolution in that sense (Article 60.II)."

[13] The New York Convention distinguishes between a challenge that successfully set aside the award and a challenge that is merely pending. *Compare* New York Convention Article V(1)(e) (providing that a court may refuse to enforce an arbitral award if

The New York Convention does not define "binding on the parties," but it would be contrary to the Convention's intent to conclude that "binding" means the award must be enforceable in the country where the arbitration took place. One of the main goals of the New York Convention "was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs." *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 576 n. 4 (7th Cir. 2007) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366-67 (5th Cir. 2003)). To that end, the New York Convention purposefully "eradicate[ed] the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2nd Cir. 1997).

Furthermore, U.S. courts have held that "[a]n arbitration award becomes binding when 'no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal).'" *Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F. 3d 1091, 1100 (9th Cir. 2011) (quoting *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 958 (S.D. Ohio 1981)). In *Cubic*

"[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"), *with* New York Convention Article VI (providing that if an application to set aside the award has been made to a competent authority in the country in which the award was made, the court "may, if it considers it proper, adjourn the decision on the enforcement of the award" pending the resolution of the foreign proceedings).

Defense Systems, the Ninth Circuit concluded that the award had become binding because all arbitration appeals had been exhausted, even though the defendant argued that "the award had not yet been confirmed." 665 F. 3d 1091, 1101 n. 6.[14] The Second Circuit has similarly concluded that "the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court," and thus an "award need not actually be confirmed by a court to be valid." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (internal citation omitted).

Respondents cite a 1989 case from the Southern District of New York for the proposition that "a determination that the award is final and binding [is made] according to the law of the country where the award was rendered." *Dworkin-Cossell Interair Courier Servs., Inc. v. Avraham*, 728 F. Supp. 156, 161 (S.D.N.Y. 1989). (Resp't Reply at 62). But *Dworkin* dealt with ambiguity in the arbitration award itself, which compelled the court to remand the award to the arbitration panel for clarification. 728 F. Supp. at 161-62. *Dworkin* cites *Fertilizer Corporation*, in which the court considered Indian law as part of the "final and binding" inquiry because the Indian Arbitration Act provided that all arbitration awards shall be final and binding unless the parties' arbitration agreement expressed a different intention. *Fertilizer Corp.*, 517 F. Supp. at 956. The *Fertilizer Corporation* court therefore took into account Indian law, the parties' agree-

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[14] *See also Boeing Co. v. KB Yuzhnoye*, 2013 WL 12131183, at *6 (C.D. Cal. Dec. 18, 2013) (concluding that because all arbitral appeals had been exhausted, and the award was being reviewed by a court, not an arbitrator, the award had become binding and Article V(1)(e) did not apply).

ment, and the rules the parties agreed to govern the arbitration, before ultimately holding that the arbitral award *was* final and binding for purposes of the New York Convention notwithstanding the fact that an Indian court was reviewing the award. *Id.* at 956-57.[15] Moreover, another district court examining *Fertilizer Corporation* found that "[n]othing in *Fertilizer Corporation* indicates the law of the arbitral situs is generally biding on the issue of whether the award is 'binding' under the New York Convention." *Aperture Software GmbH v. Avocent Huntsville Corp.*, 2015 WL 12838967, at *2–3 (N.D. Ala. Jan. 5, 2015) (unpublished).

The D.C. Circuit recently recognized that "[w]hen the 'binding' status of an award is in doubt under Article V(1)(e) of the New York Convention, the court may look to the law of the rendering jurisdiction . . . particularly when the [parties'] agreement incorporates local arbitral law . . . ." *Diag Human S.E. v. Czech Republic - Ministry of Health*, 907 F.3d 606, 611 (D.C. Cir. 2018). But there, the parties expressly agreed to a review process authorized under Czech arbitration law "in which a second *arbitral panel* can revisit the original award with the power to uphold, nullify, or

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[15] In supporting its holding, the *Fertilizer Corporation* court noted a particularly instructive comment from the General Counsel of the American Arbitration Association: "The fact that recourse may be had to a court of law does not prevent the award from being 'binding.' This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing, or threatening to bring, proceedings to have an award set aside or suspended." *Id.* at 958 (quoting G. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw.U.L.Rev. 1, 11 (1971)).

modify it." *Id.* at 608 (emphasis added). Thus, in that case, the powers of the *review arbitration panel* and the effects of its actions "hinge[d] on Czech law." *Id.* at 611. Here, the parties' agreement and the applicable IACAC Rules provided that the decisions of the Arbitral Tribunal would be final and binding.

The parties' 2005 Agreement states: "Any awards or orders issued by the Arbitral Tribunal shall be final and binding on the Parties to the Arbitration, who hereby expressly waive all motions to vacate, defenses and appeals against said award. The arbitral award may be enforced in any court having competent jurisdiction over same or over the Parties to the Arbitration or their assets." (2005 Agreement, cl. 29.2). The IACAC Rules to which the parties submitted similarly provide: "The award shall be made in writing and shall be final and binding on the parties and subject to no appeal. The parties undertake to carry out the award without delay." IACAC Rules art. 29.2. Furthermore, the Arbitral Tribunal itself certified that the Merits Award "definitively rules on [l]iability" (Merits Award p. 159), and that the Damages Award "represents the definitive decision on damages." (Damages Award p. 90). Thus, the terms of the parties' 2005 Agreement and the IACAC Rules incorporated therein contradict Respondents' characterization of the award as non-binding. *See Int'l Trading & Indus. Inv. Co. v. DynCorp Aero. Tech.*, 763 F. Supp. 2d 12, 22 (D.D.C. 2011) (concluding that "the terms of the Agreement belie any suggestion that the Award issued by the arbitrator was non-binding").

Therefore, I find that even if a Bolivian court would not enforce the award at this juncture, it is binding under the New York Convention because the arbitration has concluded, a final award has been

issued, and there are no further proceedings within the arbitral process.

C. Whether a Stay is Appropriate

Respondents argue that if the Court does not dismiss CIMSA's petition, it should nevertheless exercise its discretion under Article VI of the New York Convention to stay the case pending a decision by the Twelfth Judge on Respondents' request to annul the Damages Award. "If an application for the setting aside or suspension of the award has been made to a competent authority [of the country in which, or under the law of which, that award was made]," the court in which enforcement is sought "may, if it considers it proper," stay enforcement proceedings under the New York Convention. New York Convention, art. VI.

There is an inherent tension between the goals of the New York Convention and granting a stay. "[A] district court should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country." *InterDigital Comms., Inc. v. Huawei Invest. & Holding Co.*, 166 F. Supp. 3d 463, 470 (S.D.N.Y. 2016) (quotation omitted).

On the other hand, "where there is a parallel annulment proceeding in the originating country and there is a possibility the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings." *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (1998). In *Europcar*, the Second Circuit articulated six non-exclusive factors to consider in determining whether a

stay is warranted. 156 F.3d at 317-18. These factors are:

> (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
>
> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
>
> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
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> (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award . . . or to set the award aside . . .; (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
>
> (5) a balance of the possible hardships to each of the parties . . .; and
>
> (6) any other circumstances that could tend to shift the balance in favor of or against adjournment . . . .

Europcar, 156 F.3d at 317-18.

Although the Tenth Circuit has not had occasion to consider and apply the *Europcar* factors, a number of

federal courts have embraced their use. *See, e.g., Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 n.7 (11th Cir. 2004); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 71-72 (D.D.C. 2013). Therefore, I will address the Article VI considerations under the *Europcar* framework, beginning with the first and second factors, which, "[b]ecause the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards, . . . should weigh more heavily in the district court's determination." *Europcar*, 156 F.3d at 318.

1. The General Objectives of Arbitration

While CIMSA contends that the general objectives of arbitration are best served by confirming the award rather than granting a stay, Respondents argue that a stay is warranted because "[b]oth parties are engaged in a battle in the Bolivian courts, as they should be, given that they agreed to seek arbitration in Bolivia . . . ." (Oral Argument Tr. at 42:4-6). However, the primary goal of arbitration is to avoid extensive and costly court battles. The parties have been litigating in Bolivia for more than five years, and those proceedings have been far from expeditious. If history is any indication, the legal proceedings in Bolivia will continue for an unpredictable amount of time. Respondents concede that they "can't provide an exact time line for when the [D]amages [A]ward proceedings are going to run their course." (*Id.* at 42:8-10). And regardless of how the Twelfth Judge rules on the request to annul the Damages Award, assuming she decides she has jurisdiction to decide it, the losing party will undoubtedly seek an *amparo*. (*See id.* at 83:21-84:1).

The rising expense is also troubling. The parties' legal fees and expenses for the arbitration proceedings

alone totaled over $3 million. (*See* Damages Award ¶¶ 333, 336, p. 80). CIMSA then incurred $75,000 in legal costs just for the initial litigation proceedings relating to Respondents' request to annul the Merits Award. (*See id.* ¶¶ 210-11, p. 56). This amount was calculated before the Eighth Judge Decision and the various proceedings that followed, including the Guarantee Court Resolution No. 77/2015, the Ninth Judge Decision, and the PCT Revocation Order, so there is no telling the amount of legal costs CIMSA ultimately incurred in relation to litigation on the Merits Award. Add to this CIMSA's legal costs in litigating Respondents' challenge to the Damages Award, Respondents' legal costs for all the court proceedings in Bolivia, and the parties' legal costs in the present action, and the overall litigation expenses could now be astronomical.

Given the amount of time that has passed since the arbitration concluded and the increasing costs of protracted litigation in more than one country, I find the overarching goals of arbitration weigh in favor of confirmation and against a stay.

2. The Status of the Foreign Proceedings

Respondents urge this Court to grant a stay in light of the "significant issues of Bolivian law still to be resolved by the Twelfth Judge." (Oral Argument Tr. at 41:11-12). However, as noted above, Respondents cannot confidently estimate when a final resolution will occur. The fact that this dispute has been "stayed for nearly three years in deference to the Bolivian annulment proceedings," (Resp. at 61), only points to the protracted nature of the dispute and the likelihood that one or both of the parties will pursue further legal challenges in Bolivia.

It is not clear whether the Twelfth Judge will find she has jurisdiction to issue a decision on the request to annul the Damages Award, and the implications of her declining jurisdiction are unknown. What is known is that, assuming the Twelfth Judge asserts jurisdiction, she will then have 30 days to rule on the request to annul the Damages Award. (Oral Argument Tr. at 37:3-8).

But even then, the losing party would undoubtedly pursue an *amparo*, and the litigation could go on and on with anyone's guess as to when there would be a truly final resolution of the matter in the Bolivian courts. (*Id.* at 83:18-84:4).

Because there is "no clear end" to the litigation proceedings in Bolivia, this second factor weighs in favor of confirmation and against a stay. *See Hardy Exploration & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 106 (D.D.C. 2018) ("[T]he fact that the underlying arbitral award was rendered five years ago and the fact that there is no clear end to the Indian set-aside proceedings in sight counsels against granting [ ] a stay."), *appeal filed*, D.C. Cir. No. 18-7093; *see also Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 135 (D.D.C. 2015) ("As no final resolution appears imminent, the Court finds this factor also weighs in favor of [the party seeking to enforce the award].").

3. Scrutiny of Award in Foreign Proceedings

This factor is intended to provide appropriate "deference to proceedings in the originating country that involve less deferential standards of review on the premise that, under these circumstances, a foreign court well-versed in its own law is better suited to

determine the validity of the award." *Europcar*, 156 F.3d at 317. While neither party has addressed in detail the comparable level of scrutiny the award will receive in the remaining Bolivian proceedings, Respondents have presented nothing to indicate that the level of scrutiny the Damages Award will receive in the Bolivian proceedings tips the balance in favor of a stay.

In Bolivia, the court reviewing a request for annulment may set aside the arbitral award only on limited grounds under the New Arbitration Law.[16] These grounds, which do not appear to be much broader than those under Article V of the New York Convention, evince a conscious restriction on the available recourse against an arbitral award. As the PCT has explained, the New Arbitration Law "recogniz[es] the right to challenge the award[,] but in a strict sense[,] for the purpose of correcting defects or irregularities in arbitration decisions." (PCT Judgment 1481/2016-S3 § III.3, p.17).

The PCT has already vacated the Twelfth Judge's annulment decision and ordered the Twelfth Judge to issue a new decision consistent with the PCT's December 2016 judgment. (*See id.* p. 32).[17] While the

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[16] These include: (1) the matter is not subject to arbitration; (2) the Arbitral Award Violates law and order; (3) one of the parties' right to a defense has been affected by the arbitration proceeding; (4) the Arbitral Tribunal grossly overstepped its authority in the Arbitral Award, in relation to a dispute that was not foreseen in the arbitration agreement; and (5) the Arbitral Tribunal was irregularly created. (*See* PCT Judgment 1481/2016-S3 § III.3, p. 16).

[17] On remand, the Twelfth Judge will revisit the bases on which she annulled the Damages Award: that the Arbitral Tribunal breached Respondents' right to a defense and due process by (1) considering evidence not presented during the

parties debate the likely outcome of the Twelfth Judge's review of the annulment action on remand, it will be difficult for the judge to reach the same result without repeating the reversible errors identified by the PCT. The PCT found that the Twelfth Judge erroneously conflated and attempted to broaden the scope of application of two different grounds for annulment. (*Id.* § III.5.2, pp. 27-28). It further concluded that the Twelfth Judge impermissibly overstepped her authority by revisiting the evidence to reach a different interpretation than that reached by the arbitrators. (*Id.* § III.5.2, p. 25). This suggests that the review standard in Bolivia, even if more searching than that under the New York Convention, may not favor Respondents on remand. *See Chevron Corp.,* 949 F. Supp. 2d at 72 ("[T]he fact that the Dutch District Court has already denied the motion to set aside suggests that to the extent the standard is any more searching, it has not helped Ecuador in its attempt to resist confirmation.").

When it is not clear whether the award will receive greater scrutiny in the foreign proceedings, "the possibility that the [foreign court] will set aside the award[ ] weighs mildly in favor of granting a stay." *In re Arbitration of Certain Controversies between Getma Int'l & Republic of Guinea*, 142 F. Supp. 3d 110, 116 (D.D.C. 2015) (internal quotations omitted); *see also Venco Imtiaz Constr. Co. v. Symbion Power LLC*, 2017 WL 2374349, at *7 (D.D.C. May 31, 2017) (concluding that this factor weighs only mildly in favor of a stay even when the standard of review in the foreign proceedings is slightly less deferential and gives the

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Damages Phase to decide a portion of the damages, and (2) relying on its own experience in making its damages calculation. (Von Borries Decl. ¶ 90; Rivera Decl. ¶ 54).

foreign "court more leeway to not enforce the award"). Thus, this factor can only marginally weigh in favor of Respondents and does not tip the scale towards a stay when the first two factors favor CIMSA.

4. The Characteristics of the Foreign Proceedings

The fourth factor includes four distinct considerations: (i) whether the proceedings were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether the proceedings were initiated before the underlying enforcement proceeding so as to raise concerns of comity; (iii) whether the proceedings were initiated by the party now seeking to enforce the award in federal court; and (iv) whether the proceedings were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute. *Europcar*, 156 F.3d at 318.

Although the Bolivian proceedings were initiated before the proceedings in this Court, the remaining considerations counsel against a stay and in favor of enforcement. The first and third considerations clearly weigh in favor of enforcement given that the proceedings in Bolivia were brought by Respondents, not CIMSA, and sought to set aside rather than enforce the award.

In examining the fourth consideration, I take particular note of the fact that "a stay of confirmation should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration." *Id.* at 317. Even though CIMSA has itself filed *amparos* and objections that have added to the protracted proceedings in Bolivia, it did so to protect its interests once entangled

in Bolivian legal proceedings it did not initiate or expect. Despite the parties' agreement to "waive all motions to vacate, defenses and appeals against said award," (2005 Agreement, cl. 29.2), the Respondents wasted no time in filing a series of challenges and subsequent appeals in Bolivian courts when the outcome of the arbitration was unfavorable to them. When Respondents had the opportunity to seek suspension of the Damages Phase in Bolivia, they instead sought an injunction in Mexico. And when they failed to set aside the Merits Award through the sole annulment process available in Bolivia, (*see* Asbun Report ¶ 15), they employed unconventional and suspect means to get more favorable decisions from select judges. While Bolivian arbitration law provided Respondents with a limited mechanism for challenging the award, Respondents' "contributions to the protractedness of the litigation . . . cannot be denied." *Hardy Exploration*, 314 F. Supp. 3d at 108.

5. The Balance of the Possible Hardships to Each of the Parties

The balance of hardships also counsels in favor of enforcement rather than a stay. At the outset of their business dealings, the parties mutually agreed that disputes would be resolved through arbitration and that the decision of the arbitral tribunal would be final and not subject to appeal. Despite this agreement, CIMSA has entertained years of tumultuous legal proceedings, when it was Respondents' breach of contract that caused CIMSA to seek relief through arbitration in the first place.

Respondents breached their contract with CIMSA more than seven years ago, and CIMSA prevailed on the merits of the dispute in arbitration more than five years ago. Nearly four years have passed since the

Arbitral Tribunal handed down the Damages Award, yet CIMSA has been unable to collect a single cent of the monetary relief it was awarded. *Europcar* advised courts to "keep[ ] in mind that if enforcement is postponed under Article VI . . . the party seeking enforcement may receive 'suitable security.'" 156 F.3d at 318. While "suitable security" would provide CIMSA with necessary protection in the event of a stay, this protection does not offset the hardship CIMSA has and will suffer were this Court to continue to delay confirmation of the award. "[G]iven the length of time that [CIMSA] has waited to receive the award, and the amount of money at issue, [CIMSA] would be burdened should the Court delay confirmation of the award." *Hardy Exploration*, 314 F. Supp. 3d at 108.

6. Other Considerations

Neither party presents any other circumstances that would shift the balance in favor of or against a stay.

Because the *Europcar* factors, on balance, weigh in favor of enforcement and against a stay, I conclude that a stay is unwarranted.

IV. CONCLUSION

For the aforementioned reasons, I confirm the Final Award on Damages of the Arbitral Tribunal and lift the order suspending GCC America's obligation to file its Garnishee Report (ECF No. 18).

Accordingly, it is ORDERED that:

1. CIMSA's Motion to Lift the Abatement Order (ECF No. 42) is GRANTED;

2. CIMSA's Petition (ECF No. 1) and Motion to Confirm a Foreign Arbitral Award (ECF No. 50) are GRANTED;

3. The Clerk shall enter judgment in favor of Petitioner CIMSA in the amount of $36,139,223, plus annual interest at a rate of 6% from April 10, 2015 to the date of entry of judgment;

4. Post-judgment interest shall accrue at the applicable federal rate; and

5. Petitioner CIMSA shall be awarded its costs incurred in this action.

DATED this 25th day of March, 2019.

/s/ John L. Kane
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed December 12, 2018]

Civil Action No. 1:15-CV-02120

COMPAÑÍA DE INVERSIONES MERCANTILES S.A.,

Petitioner,

v.

GRUPO CEMENTOS DE CHIHUAHUA, S.A.B. de C.V., and GCC LATINOAMÉRICA, S.A. de C.V.,

Respondents.

ORDER RE RESPONDENTS'CROSS-MOTION TO DISMISS THE PETITION (ECF NO. 61)

Kane, J.

In their Response to Petitioner's Motion to Confirm Foreign Arbitral Award, Respondents impermissibly included a Cross-Motion to Dismiss the Petition (ECF No. 61). Local rule of practice 7.1(d) prohibits a party from including a motion in a response or reply. D.C.COLO.LCivR 7.1(d). The Cross-Motion to Dismiss the Petition, which raises jurisdictional challenges as well as arguments on the merits, should have been filed as a separate document.[1] Notwithstanding this

[1] But denying the presumed motion for this reason would be without prejudice, thus inviting a new motion that complies with

error, I have considered the jurisdictional challenges and find that this Court may properly exercise personal jurisdiction over Respondents in this case. Thus, to the extent the Cross-Motion is construed as a Motion to Dismiss for lack of jurisdiction, it is DENIED. I will not rule on the merits of the Motion to Confirm Foreign Arbitral Award (ECF No. 50) at this time, and ORDER oral argument as specified below.

FACTUAL BACKGROUND

Grupo Cementos de Chihuahua, S.A.B. de C.V. ("GCC"), a Mexican corporation with its principal place of business in Chihuahua, Mexico, "is a leading supplier of cement, aggregates, concrete and construction-related services in Mexico and the United States." (Hertzberg Decl. ¶ 2, ECF No. 1-10; GCC's 2Q2015 Earnings Report, ECF No. 1-11). In the early-2000s, GCC began "exploring the possibility of expanding" its business into the southern hemisphere. (Hertzberg Decl. ¶ 2; Amaya Decl. ¶ 5, ECF No. 62). In 2004, GCC representatives traveled to La Paz, Bolivia to meet with representatives from Sociedad Boliviana de Cemento, S.A. ("SOBOCE"), Bolivia's largest cement company. (Doria Medina Decl. ¶ 2, ECF No. 1-9; Amaya Decl. ¶ 6). Later that same year, GCC representatives mentioned to SOBOCE representatives that GCC "was interested in growth opportunities in South America." (Amaya Decl. ¶ 7). SOBOCE representatives informed the GCC representatives that Compafiía de Inversiones Mercantiles S.A. ("CIMSA"), a Bolivian corporation with its principal place of business in Bolivia, "was searching for a new

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the local rules. Enough time has already been wasted in this case by procedural quiddities which need not be compounded by my requiring the submission of a new, properly submitted motion.

partner to invest in SOBOCE." (*Id.*). At the time, CIMSA owned a controlling interest in SOBOCE. (Hertzberg Decl. ¶ 3).

As a result of these communications, GCC representatives traveled to Miami, Florida on March 25, 2005 (the "2005 Miami Meeting") to meet with CIMSA representatives and discuss GCC's "potential interest in acquiring shares in SOBOCE." (Doria Medina Decl. ¶ 5). At the meeting, CIMSA's representatives provided GCC representatives with "an appraisal of SOBOCE's enterprise value," which included "basic information about valuation, pricing, and the percentage of SOBOCE shares that might be available for sale." (*Id.*; Amaya Decl. ¶ 11). However, no explicit negotiations took place between the parties at the 2005 Miami Meeting. (Amaya Decl. ¶ 11).

Over the next six months, the parties engaged in extensive negotiations in the form of "letters, emails, and phone calls between Mexico and Bolivia, as well as meetings in those two countries." (*Id.* at ¶ 12). On September 22, 2005, GCC Latinoamérica, S.A. de C.V. ("GCC Latinoamérica"), GCC's wholly-owned subsidiary, acquired a 47 percent interest in SOBOCE. (Hertzberg Decl. ¶ 3). The terms of the sale—including the purchase price—were ultimately the same as those proposed at the 2005 Miami Meeting. (Doria Medina Decl. ¶¶ 7-8; Amaya Decl. ¶ 13). The same day, GCC, GCC Latinoamérica, SOBOCE, and CIMSA executed a shareholder's agreement (the "2005 Agreement") governed by Bolivian law. (Amaya Decl. ¶ 20). GCC guaranteed GCC Latinoamérica's obligations under the 2005 Agreement. (Hertzberg Decl. ¶ 3).

The 2005 Agreement provided, among other things, that each party had a right of first refusal with respect to the other's shares in SOBOCE. (Doria Medina Decl.

¶ 10). Under the agreement, either party could "transfer its shares to a third party after a period of five years." (*Id.*). However, the party wishing to transfer its shares could only do so after providing notice and "afford[ing] the other party an opportunity to purchase the shares on the same or better terms within 30 days." (*Id.*). The 2005 Agreement also provided that any dispute between the parties would be "resolved by arbitration administered by the National Chapter of the *Comisión Inter-Americana de Arbitraje Comercial* ("CIAC") in Bolivia." (Amaya Decl. ¶ 26; 2010 Shareholders' Agreement, cl. 15.1, ECF No. 62-4).

On September 23, 2005, GCC paid for the SOBOCE shares using "a bank account it held at a branch of Wells Fargo Bank, N.A., located in San Francisco, California." (Doria Medina Decl. ¶ 8). Additionally, under the 2005 Agreement, CIMSA and GCC Latinoamérica "were entitled to receive annual payments of shareholder dividends from SOBOCE." (Doria Medina Decl. ¶ 9). From 2005 to 2011, GCC and GCC Latinoamérica (collectively, "Respondents") "directed SOBOCE to distribute dividends due to them" to the same Wells Fargo account each year—approximately $21 million in total. (*Id.*).

In 2009, Respondents informed CIMSA of their desire to sell their SOBOCE shares. (Amaya Decl. ¶ 24). Pursuant to CIMSA's right of first refusal under the 2005 Agreement, the parties met in Miami six different times in 2010 (the "2010 Miami Meetings") to negotiate an agreement that would allow CIMSA to purchase Respondents' shares in SOBOCE (the "2010 Agreement"). During these meetings, the parties discussed—and eventually resolved—several "key conflicts regarding the purchase price, timing, and other terms of the sale." (Doria Medina Decl. ¶ 14).

On April 23, 2010, during the final 2010 Miami Meeting, the parties "came to an agreement regarding fundamental terms of sale." (*Id.*). The parties signed an agreement in La Paz, Bolivia the following month. (*Id.*).

However, the Government of Bolivia "expropriated a substantial division of SOBOCE's business" shortly before the transaction was scheduled to close. (Doria Medina Decl. ¶ 15). As a result, CIMSA was unable to pay for Respondents' shares under the terms of the 2010 Agreement and, thus, the parties failed to close the deal. (*Id.*; Amaya Decl. ¶ 29).

In June 2011, the parties agreed to meet in Houston, Texas (the "2011 Houston Meeting") in order to negotiate another agreement under which CIMSA would purchase Respondents' SOBOCE shares pursuant to its right of first refusal under the 2005 Agreement (the "2011 Agreement"). (Doria Medina Decl. ¶ 16; Amaya Decl. ¶¶ 31-32). During the meeting, CIMSA proposed "two alternative payment structures." (Doria Medina Decl. ¶ 18). Negotiations continued via telephone and email for several weeks, but the parties ultimately agreed on one of the payment terms CIMSA proposed at the 2011 Houston Meeting. (*Id.* at ¶¶ 19-22). In August 2011, Respondents "instructed CIMSA to hire New York counsel to draft a final agreement." (*Id.* at ¶ 22). Respondents also retained their own counsel from a New York-based law firm, and the parties agreed that New York law would govern the 2011 Agreement. (*Id.*). Nevertheless, Respondents proceeded to sell their SOBOCE shares to a third party on August 18, 2011, despite previous indications that the payment term CIMSA suggested at the 2011 Houston Meeting was satisfactory. (Doria Medina Decl. ¶ 26; Amaya Decl. ¶¶ 39-41).

In response, CIMSA submitted a notice of arbitration to the CIAC against Respondents in Bolivia, and the parties appointed their chosen arbitrators (the "Tribunal"). (Doria Medina Decl. ¶¶ 27-28). On September 13, 2013, the Tribunal issued a Partial Award on the Merits and Jurisdiction (the "Merits Award") in favor of CIMSA. (*Id.* at ¶ 29). The Merits Award held, among other things, that Respondents breached the 2005 Agreement by "failing to negotiate with CIMSA in good faith following the Houston meeting." (*Id.*).

On April 10, 2015, the Tribunal issued a Final Award on Damages (the "Damages Award"). (*Id.* at ¶ 30; *see also* Damages Award, Pet. Ex. D, ECF No. 1-8). In calculating the Damages Award, the Tribunal selected the valuation "carried out by management in March 2010 that did not envisage the creation of a plant by the Government." (Damages Award ¶ 304). This valuation is the "same valuation SOBOCE representatives presented to GCC" during the 2010 Miami Meetings. (Pet'r Reply at 17, ECF No. 73; Doria Medina Decl. ¶¶ 13-14).

Respondents subsequently sought to annul the awards in a Bolivian court. (*See* Von Borries Decl. ¶ 40, ECF No. 46; Rivera Decl. ¶¶ 16-18, ECF No. 65). Additionally, Respondents obtained from a Mexican court in Chihuahua, Mexico an *ex parte* anti-arbitration injunction "precluding CIMSA from commencing or continuing any action directing at confirming or enforcing any award issued by the [the Tribunal] in the proceedings." (Von Borries Decl. ¶ 34). While CIMSA argues that Bolivia's highest court ultimately upheld the Merits Award after a lengthy review

process, Respondents contest this point.[2] (Pet'r Mot. at 14, ECF No. 50; Resp'ts Resp. at 15, ECF No. 61). It is undisputed that annulment proceedings regarding the Damages Award remain ongoing in Bolivia. (Pet'r Mot. at 15; Resp'ts Resp. at 16). CIMSA now seeks to confirm and enforce the Damages Award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") in this Court.

Respondents contest this Court's exercise of jurisdiction, arguing that it lacks personal jurisdiction over the Respondents,[3] and, alternatively, that the action should be dismissed on the basis of *forum non conveniens* because Mexico is an adequate alternative forum.

ANALYSIS

For a court to exercise specific personal jurisdiction over a nonresident defendant, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316

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[2] Respondents argue that the Merits Award is invalid under Bolivian law. However, as noted above, this Order focuses on the issue of jurisdiction and does not analyze the merits of the parties' claims regarding the enforceability of the awards under Bolivian law.

[3] Because I find that this Court has specific personal jurisdiction over Respondents, I need not address the question of whether the Court has *quasi in rem* jurisdiction over GCC. *See* Compl. at 2, ECF No. 2 (asserting that this Court has quasi in rem jurisdiction over GCC based upon its ownership of property in the District of Colorado); Resp'ts Resp. at 20-21 (contending that Respondents have no assets in the United States to support *quasi in rem* jurisdiction).

(1945) (internal quotations omitted). Federal Rule of Civil Procedure 4(k)(2) allows courts to aggregate nationwide contacts in order to exercise jurisdiction where the defendant's contacts with any one state are insufficient. Fed. R. Civ. P. 4(k)(2); *see Pandaw Am., Inc. v. Pandaw Cruises India Pvt. Ltd.*, 842 F. Supp. 2d 1303, 1311 (D. Colo. 2012). In order to establish jurisdiction under Rule 4(k)(2), a plaintiff must show that: "(1) the plaintiff's claim arises under federal law; (2) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (3) the exercise of jurisdiction comports with due process."[4] *Pandaw*, 842 F. Supp. 2d at 1310 (internal citations omitted). With respect to the third prong, a court may

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[4] Because Respondents do not dispute the first two requirements for jurisdiction under Rule 4(k)(2), this Order focuses on whether the Court's exercise of personal jurisdiction would comport with due process. However, I note that in analyzing the second requirement, courts in this district have adopted the following approach taken by most circuits:

> A defendant who wants to preclude the use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there . . . . If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other state where suit is possible, then the federal court is entitled to use Rule 4(k)(2). This procedure makes it unnecessary to traipse through the 50 states, asking whether each could entertain the suit.

Pandaw, 842 F. Supp. 2d at 1303 (quoting *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir.2001); *see also Archangel Diamond Corp.*, 75 F. Supp. 3d at 1362 (agreeing with the approach taken by the Seventh Circuit and the district court in *Pandaw*). Here, Respondents contest jurisdiction in the United States and fail to identify any state were suit is possible.

constitutionally exercise jurisdiction under Rule 4(k)(2) "as long as [the defendant] has minimum contacts with the United States as a whole." *Archangel Diamond Corp. Liquidating Tr. v. OAO Lukoil*, 75 F. Supp. 3d 1343, 1365 (D. Colo. 2014); *see also Pandaw*, 842 F. Supp. 2d at 1311 ("[T]he forum in this analysis is the United States as a whole rather than Colorado."). Under this part of the analysis, "there is no requirement that there be any contacts at all with the forum state, 'even though it is a relevant factor to consider.'" *Archangel Diamond Corp.*, 75 F. Supp. 3d at 1365 (quoting *Touchtone Grp., LLC v. Rink*, 913 F. Supp. 2d 1063, 1072 (D. Colo. 2012)).

In order to determine whether the Respondents' contacts with the United States are sufficient to support a constitutional exercise of specific personal jurisdiction, I must analyze whether: (1) Respondents performed some act "by which [they] purposefully avail[ed] [themselves] of the privilege of conducting activities in the forum"; (2) CIMSA's claim is one that "arises out of or results from the [Respondents'] forum-related activities"; and (3) the exercise of jurisdiction is reasonable. *Taylor v. Phelan*, 912 F.2d 429, 432 (10th Cir. 1990) (quoting the test set forth in *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977)).

I. PERSONAL JURISDICTION

A. Respondents' Contacts Constitute Purposeful Availment

The first prong of the due process analysis states that "the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the

forum, thereby invoking the benefits and protections of its laws." *Taylor*, 912 F.2d at 432 (10th Cir. 1990) (internal citations omitted). Purposeful availment "precludes specific jurisdiction as a result of 'random, fortuitous, or attenuated contacts.'" *Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd.*, 385 F.3d 1291, 1296 (10th Cir. 2004) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Thus, a court "must examine the quality and quantity" of a defendant's contacts with the forum to determine whether the exercise of personal jurisdiction over the defendant comports with due process. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1092 (10th Cir. 1998).

For example, in *Telecordia Tech Inc. v. Telkom SA Ltd.*, the Third Circuit held that "traveling to the forum to consult with the other party can constitute purposeful availment." 458 F.3d 172, 177 (3d Cir. 2006) (internal citation omitted). There, Telecordia—a New Jersey corporation—brought a petition to enforce a foreign arbitral award it received resulting from the breach of a multimillion dollar contract it entered into with Telkom, a South African telecommunications company. *Id.* at 175. Telkom visited New Jersey on numerous occasions "in connection with" the contract, including traveling "to participate in testing-related matters once problems arose in the contract." *Id.* at 178. Although the arbitral proceedings took place in London and applied South African law, Telkom frequently communicated with Telecordia's New Jersey office, paid Telecordia through a New Jersey bank, and "breached the contract by failing to make payments to said New Jersey bank." *Id.* The Third Circuit concluded that Telkom's contacts with the forum constituted purposeful availment because, among other things, Telkom representatives traveled to the forum

pursuant to the business relationship of the parties. *Id.* at 178. Additionally, the court noted that "although the New York Convention does not diminish Due Process constraints" in asserting personal jurisdiction over a foreign defendant, "the desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether Telkom 'reasonably anticipate[d] being haled into' a New Jersey court." *Id.* at 178-179 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Here, although Respondents themselves possess no assets in Colorado, GCC's Denver, Colorado-based subsidiary—GCC America, Inc. ("GCC America")—does. (*See* Schuette Report ¶ 1.2, ECF No. 74). Consequently, in 2016, GCC generated "more than 70 percent of its income from sales in the United States" and borrowed at least $260 million from U.S. investors in 2013 and again in 2017. (*Id.* at ¶¶ 1.2, 2). Additionally, at least one of Respondents' senior representatives—GCC's general counsel—maintains an office in Denver, Colorado. (Sareva Decl. ¶¶ 21-22, ECF No. 44). But my analysis is not limited to Colorado. Because Rule 4(k)(2) requires the Court to "consider national contacts with the United States," *Archangel Diamond Corp.*, 75 F. Supp. 3d at 1364, Respondents' contacts also include, as CIMSA suggests, activities in Miami, Houston, New York, and San Francisco. (*See* Pet'r Reply at 4).

Respondents argue that their contacts with the United States—the 2005 Miami Meeting, the 2010 Miami Meetings, the 2011 Houston Meeting, the use of a United States bank account, the retention of a New York attorney, and the inclusion of a New York choice-of-law provision in the 2011 Agreement—are too isolated to constitute purposeful availment.

Respondents contend that the meetings in Miami and Houston represent only a fraction of the meetings and communications between the parties and, thus, are insufficient to establish purposeful availment. Respondents note that the parties never executed the 2011 Agreement, which contained a New York choice-of-law provision, and that the agreement the parties did execute—the 2005 Agreement—was governed by Bolivian law. Thus, Respondents argue, these contacts with the United States "are insufficient to establish the purposeful availment element of the due process test." (Resp'ts Resp. at 27) (internal quotations omitted).

CIMSA, on the other hand, stresses that courts must consider the quality and nature of a party's contacts with the forum in determining whether personal jurisdiction is appropriate. (*See* Pet'r Reply at 5). While it is relevant that other negotiations between the parties occurred outside the United States, it does not change the fact that Respondents met with CIMSA within the forum *eight times*, and they did so "pursuant to the business relationship" of the parties—just as Telkom did in *Telecordia Tech*. *Telecordia Tech*, 458 F.3d at 178. At nearly all of these meetings, senior representatives of Respondents, CIMSA, and SOBOCE discussed the fundamental terms of ongoing and prospective contracts between them, including "price, timing, and other terms of sale." (Doria Medina Decl. ¶ 14).

Furthermore, like Telkom in *Telecordia Tech*, Respondents used a U.S. bank—Wells Fargo in San Francisco, California—in connection with a binding agreement between the parties. In 2005, Respondents purchased the SOBOCE shares through its Wells Fargo bank account in order to consummate the 2005

Agreement. (*See* Doria Medina Decl. ¶ 8). Although Respondents did not make any additional periodic payments through the bank like Telkom did in *Telecordia Tech*, they did direct SOBOCE to distribute the dividends due to them under the agreement through the same bank account from 2005 to 2011. (*Id.* at ¶ 9). Citing *Hau Yin To v. HSBC Holdings PLC*, 2017 WL 816136 (S.D.N.Y. Mar. 1, 2017), Respondents argue that the use of a U.S. bank account "incidental to a foreign transaction" is insufficient to establish personal jurisdiction. (*See* Resp'ts Resp. at 25). But unlike *Hau Yin To*, the use of a U.S. bank here was not "passive." *See Hau Yin* To, 2017 WL 816136 at *9 n.6. In this case, foreign parties selected to open and use, for several years, a U.S. bank account in connection with their business relationship. (*See* Pet'r Reply at 15-16). And here, the parties did not use U.S. banks simply for the "conversion of currency" into U.S. Dollars. *Cf. United World Trade, Inc. v. Mangyshiakneft Oil Production Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (concluding that because no part of the contract was to be performed in the United States, "the transfer and conversion of currency in the United States [was] not a 'direct' effect that would provide a basis for jurisdiction").

These contacts in the aggregate—coupled with "the desire to have portability in arbitral awards prevalent in the Convention" discussed in *Telecordia Tech*—indicate that Respondents "reasonably anticipated being haled into" court in the United States. *Telecordia Tech*, 458 F.3d at 178-79.

B. CIMSA'S Claims Arise Out of Respondents' Contacts

The second prong of the due process analysis states that "the claim must be one which arises out of or

results from the defendant's forum related activities." *Taylor*, 912 F.2d at 432 (internal quotations omitted). A court may apply either a but-for or proximate cause test in determining whether the plaintiff's cause of action arises out of the defendant's contacts with the forum. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2008) (finding no need to pick between the tests because plaintiffs' cause of action would arise from defendants' contacts with Colorado under either theory). Under the but-for approach, "any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction." *Id.* at 1078. By comparison, the proximate cause test is "considerably more restrictive" and "calls for courts to examine whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Id.*

Here, CIMSA argues that, even under the more restrictive proximate cause test, the 2005 Miami Meeting, the resulting 2005 Agreement, and Respondents' initial performance under that agreement in the 2010 Miami Meetings and the 2011 Houston meetings—which the parties conducted pursuant to CIMSA's right of first refusal—are relevant to CIMSA's claims. (*See* Pet'r Reply at 17). In evaluating SOBOCE's value and, thus, CIMSA's damages, the Tribunal selected the same valuation SOBOCE representatives presented to Respondents at the 2010 Miami Meetings. Additionally, in determining whether Respondents breached the 2005 Agreement, the Tribunal referenced the 2011 Houston Meeting and specifically cited to the failed 2011 Agreement—which was negotiated by U.S. attorneys, contained a U.S. choice-of-law provision, and required participation of a U.S. bank—in support of its conclusion that

Respondents created a legitimate expectation that CIMSA would be able to exercise its right of first refusal under the 2005 Agreement. (*See id.*; Pet'r Mot. at 4-5). Thus, CIMSA argues, these contacts satisfy the proximate cause test because they are sufficiently relevant to Respondents' underlying breach of the 2005 Agreement, which led to the arbitral award CIMSA now seeks to enforce.

Respondents argue, among other things, that CIMSA's claims arise out of the *underlying arbitration proceeding*—which occurred entirely in Bolivia—rather than the parties' contractual dispute. Respondents' construction of the "arising out of" requirement in the context of foreign arbitral awards seemingly limits the Court's jurisdiction under the Convention to disputes between foreign parties only where the arbitration proceedings took place in the United States. (*See* Resp'ts Reply at 33-35, ECF No. 78; Pet'r Reply at 19).

As CIMSA argues, however, this limited construction makes little sense in the context of actions under the Convention and courts evaluating specific jurisdiction in confirmation proceedings "consistently consider whether the defendants' contacts 'arise out of' the underlying dispute, not the arbitral proceedings." (Pet'r Reply at 18). Like the arbitral proceedings here, the proceedings in *Telecordia Tech* took place entirely outside the United States and applied the law of a foreign forum. Nevertheless, the Third Circuit exercised jurisdiction over Telkom after finding Telecordia's claims arose out of Telkom's contacts with the forum, including—as is the case here—repeated travel to the United States in connection with the agreement. *See Telecordia Tech*, 458 F.3d at 178. Thus, while the award to be confirmed under the

Convention does not *necessarily* need to have been issued outside the United States, the fact that it was does not bar a U.S. court from exercising jurisdiction and enforcing the award when the underlying dispute arises out of sufficient contacts with the forum. A contrary result would frustrate the primary purpose of the Convention: to authorize the courts of signatory states to enforce foreign arbitral awards.

Therefore, CIMSA's claims "arise out of" Respondents' contacts with the United States.

C. Exercising Jurisdiction over Respondents is Reasonable

The third—and final—prong of the due process analysis states that the "exercise of jurisdiction must be reasonable." *Taylor*, 912 F.2d at 432 (internal quotations omitted). A court "assess[es] reasonableness by weighing five factors: '(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.'" *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 488 F.3d 1282, 1292 (10th Cir. 2007) [hereinafter *THAN*] (quoting *Intercon, Inc. v. Bell Atl. Internet Sols., Inc.*, 205 F.3d 1244, 1249 (10th Cir. 2000)). Additionally, a court evaluating reasonableness must take the "strength of a defendant's minimum contacts" into account. *THAN*, 488 F.3d at 1292. The reasonableness prong "evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction."

OMI Holdings, Inc., 149 F.3d at 1092 (alteration in original) (quoting *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994)).

In *THAN*, the Tenth Circuit held that exercising jurisdiction in Kansas over several European insurers (collectively, the "Insurers") would be unreasonable. 488 F.3d at 1297-98. There, TH Agriculture & Nutrition, LLC ("THAN")—a Kansas corporation—sued the Insurers for breach of insurance policies. *Id.* at 1284-85. The policies contained a "worldwide territory-of-coverage clause" with an option to defend THAN in legal proceedings, but the Insurers did not solicit business in or receive payments from Kansas. *Id.* at 1288. Philips, THAN's parent company headquartered in the Netherlands, "solicited the insurance policies through a Dutch broker . . . and all dealings related to the policies . . . took place in the Netherlands or Switzerland." *Id.* Additionally, the policies included a clause stating that "any dispute" between the parties would be "subject to the law of the Netherlands" and would be litigated in a Dutch court. *Id.* at 1286.

The Tenth Circuit concluded in *THAN* that three reasonableness factors—the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in obtaining efficient resolution, and the state's interest in furthering fundamental substantive policies— weighed in favor of the Insurers. *Id.* at 1288. The court explained that THAN could receive "convenient and effective relief" in the Netherlands, none of the necessary witnesses resided or transacted business in the forum, and, in light of the choice-of-law provision, "exercising jurisdiction in Kansas would interfere with Dutch sovereignty." *Id.* at 1294, 1296, 1297. Additionally, the court determined that the remaining two factors—the burden on the defendant

and the forum state's interest in adjudicating the dispute—did not weigh for or against the exercise of jurisdiction.[5] *Id.* at 1297.

Here, Respondents argue that all five fairness factors weigh in favor of a finding of unreasonableness. They contend that the travel and "translation of voluminous documents" required to litigate this matter in the United States "impose a substantial burden" on them as nonresidents and that here, as was the case in *THAN*, the "worldwide nature" of their business is insufficient alone to eliminate the burden placed on them. (Resp'ts Resp. at 30, ECF No. 61). Additionally, Respondents claim that they themselves possess no assets in the United States and argue that Colorado has "little or no interest in resolving the matter." (*Id.*) Furthermore, Respondents argue that the third and fourth factors favor a finding of no personal jurisdiction because Petitioner, like the plaintiff in *THAN*, can receive convenient, effective, and efficient relief in another forum—Mexico.

CIMSA's counterarguments are more compelling. First, unlike the Insurers in *THAN*, Respondents repeatedly demonstrated their willingness and ability to travel to the United States to negotiate key terms of the Agreement. While the "worldwide nature" of a party's business is insufficient alone to eliminate the burden of litigating in the United States, Petitioner

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[5] First, the court noted that while "modern technology and the worldwide nature of the Insurers' business minimize the burden of litigating in a foreign forum," they are not significant alone to "tip the scales in *favor* of exercising jurisdiction." *Id.* at 1293, 1297. Second, the court reasoned that the fact that "the law of the Netherlands, not Kansas, [governed] the dispute" balanced the forum's interest in "providing a forum for resolution of its resident's dispute." *Id.* at 1297.

argues that regular travel in connection with the Agreement indicates that the first factor "should not weigh in favor of either party." (Pet'r Reply at 20). Second, unlike the Insurers in *THAN* who received no payments from the forum, GCC concedes that it generates 70 percent of its global income— approximately $550 million—from sales within the United States, and "has borrowed at least $260 million from U.S. investors in 2013 and again in 2017." (*Id*; Schuette Report ¶ 1.2; GCC 2017 Offering Mem., Ex. A to Schuette Report, ECF No. 74). Additionally, one of Respondents' senior executives—GCC's general counsel—maintains an office in Denver. (Savera Decl. ¶¶ 21- 22). As CIMSA argues, Respondents' substantial business in the forum constitutes conduct affecting forum residents and, thus, supports a finding of reasonableness.

Third, despite Respondents' claim that CIMSA could receive convenient and effective relief in Mexico, Respondents obtained an *ex parte* court order from a Mexican court "expressly enjoin[ing] CIMSA from commencing any proceedings to confirm the award in Mexico." (Pet'r Reply at 34). Respondents' assertion that Mexico is an adequate alternative forum is doubtful at best. Respondents claim that (1) the *ex parte* anti-arbitration injunction is a preliminary injunction which CIMSA is "free to challenge" before the Mexican court, and (2) the injunction remained in effect only "until the annulment proceedings with respect to the [Merits Award] . . . concluded, which CIMSA itself argues has already occurred." (Resp'ts Reply at 37). However, while CIMSA is "free to challenge" the injunction in a Mexican court, it remains wholly uncertain whether such a challenge would be successful. CIMSA's demonstrated inability to even serve Respondents in Mexico indicates that

fair and efficient litigation of these proceedings in that forum is unlikely.[6]

Furthermore, Respondents' characterization of the *ex parte* injunction is misleading. While part of the Mexican court order calls for "[t]he suspension of the Damages Phase [of the Arbitral Proceedings] pending a . . . definitive decision on GCC's request for annulment by the competent Bolivian courts," a separate section of the same order grants GCC "[a]n injunction precluding CIMSA from commencing or continuing *any action* directed at confirming or enforcing *any award* issued by the Arbitral Tribunal in the proceedings." (Van Borries Decl. ¶ 34) (emphasis added). Therefore, the injunction's scope likely is not limited to the Merits Award—a point Respondents would almost certainly make if CIMSA sought enforcement of the Damages Award in a Mexican court.

CIMSA's situation presents a sharp contrast from *THAN*, where no facts indicated the Dutch court was inadequate and the parties agreed their contract would be governed by Dutch law in a Dutch forum. Here, it is impossible to say with any certainty that Mexico is an adequate alternative forum or that an attempt by CIMSA to enforce its award in Mexico would be considered fairly and efficiently. For these reasons, the third and fourth fairness factors favor a finding of reasonableness as well.

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[6] I previously granted CIMSA's Motion to Authorize Alternative Service in part because of the inability to effectuate service in Mexico. (Order Granting Mot. to Authorize Alternative Service, ECF No. 79). Here, I again find that "the Mexican authorities' inability or unwillingness to serve the Respondents at their corporate headquarters" belies the contention that Mexico is an adequate alternative forum for CIMSA's claim. (*Id.* at 2).

Finally, the fifth factor weighs in favor of CIMSA because the United States, as a member of the Convention, has a strong policy in favor of arbitration. First, a decision declining to exercise jurisdiction simply because Respondents have stronger contacts with other U.S. states is inconsistent with Rule 4(k)(2) and risks precluding CIMSA from seeking relief effectively in other forums. Under Rule 4(k)(2), courts analyze a defendant's contacts with the United States as a whole. Consequently, the jurisdictional analysis is no different here than if CIMSA filed in Florida, Texas, California, or any other U.S. forum where Respondents' contacts purportedly are less attenuated. Given the universal applicability of this analysis, a ruling that personal jurisdiction is improper may affect adversely CIMSA's chances of obtaining relief in another U.S. forum.

Leaving CIMSA without a forum to seek enforcement of its award would frustrate many of the substantive policy goals the Convention purports to further. And, as explained above, Respondents have not shown that Mexico is an adequate alternative forum. Refusing to assert jurisdiction under these circumstances would deprive CIMSA of its best—and perhaps its only— chance at seeking relief. Such a result undoubtedly frustrates the Convention's primary goal: to encourage arbitration by recognizing and enforcing arbitral awards granted in other contracting states.

II. THE DOCTRINE OF *FORUM NON CONVENIENS* IS INAPPLICABLE

Respondents also argue that, even if the Court does possess jurisdiction, the action should be dismissed on the basis of *forum non conveniens*. "There are two threshold questions in the *forum non conveniens*

determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process . . . and second, whether foreign law applies." *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998) (internal citations omitted). Only if "the answer to both questions is yes [does] the court [go] on to weigh the private and public interests bearing on the *forum non conveniens* decision." *Id.* at 606.

The Tenth Circuit has not directly addressed whether the doctrine of *forum non conveniens* is available in an arbitral award confirmation proceeding such as this, and I see no reason to expressly hold that it is in this case. As explained above, I reject Respondents' contention that Mexico is an adequate alternative forum. Furthermore, jurisdiction in this forum is supported by the United States' "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Therefore, because Mexico is not an adequate alternative forum and because the policy goals of the Convention weigh in favor of exercising jurisdiction, dismissal on the basis of *forum non conveniens* is inappropriate.

CONCLUSION

For the reasons above, I find that jurisdiction over Respondents is proper. Thus, to the extent the Cross-Motion to Dismiss the Petition (ECF No. 61) is construed as a Motion to Dismiss for lack of jurisdiction, the Cross-Motion is DENIED. I will not rule on the merits of the Motion to Confirm Foreign Arbitral Award (ECF No. 50) at this time, and ORDER the parties to present oral argument on the question of

confirming the foreign arbitral award at a hearing to be scheduled by the Court. The parties are ORDERED to confer and call chambers JOINTLY on or before January 8, 2019, to set a date and time for the hearing, 303-844-6118.

DATED this 12th day of December, 2018.

/s/ John L. Kane
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed October 22, 2018]

Civil Action No. 1:15-cv-02120-JLK

COMPAÑÍA DE INVERSIONES MERCANTILES S.A.,

Petitioner,

v.

GRUPO CEMENTOS DE CHIHUAHUA, S.A.B. de C.V.,
and GCC LATINOAMÉRICA, S.A. de C.V.,

Respondents.

ORDER GRANTING PETITIONER'S
MOTION TO AUTHORIZE ALTERNATIVE
SERVICE (ECF No. 43)

Petitioner, Compafiía de Inversiones Mercantiles S.A. ("CIMSA"), seeks an Order pursuant to Federal Rule of Civil Procedure 4(f)(3) authorizing CIMSA to serve Respondents through alternative means (ECF No. 43). Rule 4(f)(3) permits service "by other means not prohibited by international agreement, as the court orders." FED. R. CIV. P. 4(f)(3). In this case, CIMSA must "show[ ] that [it] made reasonable efforts to serve the [Respondents] pursuant to the Hague Convention and that the court's intervention will avoid further unduly burdensome or futile efforts at service." *Clancy Sys. Int'l, Inc. v. Image Sensing Sys.*, No. 16-cv-01848-CMA-KMT, 2016 U.S. Dist. LEXIS 190020, at *7-8 (D. Colo. Oct. 14, 2016) (internal quotations and citations omitted). For the reasons that

follow, I find that CIMSA has satisfied both elements and hereby GRANT the Motion to Authorize Alternative Service.

First, CIMSA acted with reasonable diligence in attempting to effect service through the Mexican Central Authority (MCA). CIMSA complied with the MCA's requirement to submit a separate form for each Respondent, and the Request for Service, complete with two forms, was accepted by the MCA and forwarded to the judicial authorities in Chihuahua. The failure to effectuate service was due not to any error on CIMSA's part, but was the result of the judicial officer's purported inability to locate Respondents at the address provided. The judicial officer's claim that she was unable to locate Respondents at the address provided is confounding given that the Request for Service contained the correct address—Respondents' only publicly available address. Notably, this is the same address at which CIMSA successfully delivered to Respondents a copy of the summons and complaint via DHL. (Mot. at 4; Pet'r's Reply at 3-4, ECF No. 67).

Second, allowing service through alternative means will avoid the unnecessary delays that would result from further efforts to effect service under the Hague Convention, efforts which are certain to be burdensome and likely to be futile. It took the MCA nearly two years to notify CIMSA that the judicial authorities in Chihuahua had been unable to serve Respondents. (Mot. at 3). Given the Mexican authorities' inability or unwillingness to serve the Respondents at their corporate headquarters, I am doubtful that further attempts to effectuate service under the Hague Convention would be efficient or successful. The

court's intervention is warranted under these circumstances.

Finally, it is clear that Respondents are on notice of these proceedings and are in regular contact with counsel. They have submitted multiple briefs and other filings, yet refuse to waive service or authorize their counsel to accept service. I will not abide Respondents' irksome and peevish attempts to frustrate service unnecessarily while they actively participate in the present litigation. Therefore, I find that service of Respondents through their U.S. counsel, Cleary Gottlieb and/or general counsel Sergio Saenz, by e-mail will comport with due process.

Accordingly, the Motion to Authorize Alternative Service (ECF No. 43) is GRANTED, and CIMSA shall promptly effectuate service of process upon Respondents through their U.S. counsel.

DATED this 22nd day of October, 2018.

/s/ John L. Kane
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE