No. 20-1033

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent CIMSA does not dispute that authorities widely and fundamentally divide over whether email service comports with the Hague Service Convention. Nor does CIMSA dispute that this issue especially warrants this Court's review, given its frequency as well as the import compliance with the Hague Service Convention has for international comity. Nor does CIMSA dispute that waiting to resolve this issue would be inadvisable because more and more cases are at risk of being voided if service is deemed improper; for the sake of all concerned, it is far better to determine now rather than years later if lower courts are relying upon improper modes of service.

Instead of contesting these points, CIMSA rests on the notion that this case is a poor vehicle because it involves email service on U.S. counsel, rather than an email directly to the foreign corporation. To the contrary, however, email service on U.S. counsel affords the ideal factual posture for addressing the issue. This is often the exact form of email service that district courts consider, and there are numerous cases both allowing and disallowing such service. This Court's guidance therefore would be especially apt and instructive in this context. Moreover, this scenario represents the most egregious assault upon the Hague Service Convention: It invites circumvention of the treaty's detailed service requirements whenever a foreign company has retained domestic counsel. According to the court below, once a foreign company contests service by appearing through domestic counsel, it has effectively acceded to service through that counsel. This theory of service punishes foreign companies that properly appear in U.S. court

while rewarding those that choose not to appear and not to educate themselves with the benefit of U.S. counsel. This Court should decide whether or not such circumvention of the Hague Service Convention should continue, as numerous district courts along with the court below have condoned.

CIMSA's argument that email service on U.S. counsel is not service outside the United States, and thus does not fall within the Hague Service Convention, is a red herring. CIMSA sought alternative service specifically under Rule 4(f)(3), which allows for service *only outside* the United States—specifically upon "an Individual in a Foreign Country," through "means not prohibited by international agreement." In other words, the instant service cannot be permissible unless (as the Tenth Circuit held) email service on U.S. counsel is deemed service outside the United States—which means the Hague Service Convention must necessarily be considered. Regardless, any questions about Rule 4(f)'s import for email service on U.S. counsel are undoubtedly worthy of this Court's review given how frequently courts approve this form of service. Moreover, CIMSA provides no legal basis for its attempt to equate U.S. counsel to an agent for service of process.

In the alternative, the Court should grant certiorari, vacate the judgment, and remand ("GVR") in light of *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). The Tenth Circuit recognized that this case presented a "close question" on jurisdiction, given that all parties are foreign; the contract was signed abroad, governed by foreign law, and allegedly breached abroad; and the alleged injury occurred abroad. The Tenth Circuit nonetheless held that a few meetings in the United

States formed "part of the narrative" of the case, and that this sufficed for specific jurisdiction. *Ford* casts substantial doubt on this reasoning. Without adopting a strict causal test, *Ford* held that isolated contacts do not suffice, and that the location of the injury and the forum's interest in the suit are critical factors. The Tenth Circuit failed to consider these points, and should have the opportunity to do so. Moreover, *Ford*'s insistence that the forum contacts be connected to the specific claim at issue conflicts with the Tenth Circuit's approach, which looked only at the connection to the claim in the *Bolivian arbitration* (rather than the claim in the United States to enforce the arbitral award). For this reason too, if certiorari is not granted on the first question presented, a GVR would be warranted.

ARGUMENT

I. CIMSA FAILS TO CONFRONT 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. CIMSA Does Not Dispute That A Widespread Division Of Authority On This Issue Warrants This Court's Review

CIMSA recognizes (BIO 19) that "GCC is correct that district courts are divided on the question of whether *email* service directly upon a foreign defendant is permissible under the Hague Service Convention." As GCC explained (Pet. 11-14), this division is remarkable for its scope, with at least a dozen treating such service as improper and fifty-plus holding the contrary. CIMSA notes (BIO 1) that there is no circuit

split, but provides no reason why the enormity of the split among district courts would not itself justify this Court's review. And because district court decisions *prohibiting* email service are almost never appealed, development of a natural circuit split is being artificially stunted.

CIMSA also ignores the problem (Pet. 24) that courts are now routinely thwarting the Hague Service Convention. If service in these cases is ultimately deemed improper, then the proceedings in these cases will be voided for lack of jurisdiction. Moreover, the widespread allowance of email service in U.S. proceedings encourages other countries to permit email service on U.S. parties in foreign proceedings, in conflict with Hague Service Convention requirements. In sum, there are special, powerful reasons why this Court should not await further percolation or another vehicle before deciding the question presented for the benefit of myriad lower courts that may right now be getting it wrong.

B. CIMSA Fails To Reconcile The Decisions Allowing Service By Email With This Court's Precedents

Dozens of cases are allowing email service contrary to the Hague Service Convention and *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). As GCC explained (Pet. 17-18) and CIMSA ignores, these decisions stem from a misreading of a case that did not involve the Hague Service Convention; these courts often blindly cite each other, even as those cases and commentators that seriously examine the issue recognize the conflict.

CIMSA's attempt (BIO 21-23) to elide *Volkswagenwerk* is unavailing. *Volkswagenwerk* held that, 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." 486 U.S. at 706 (emphasis added). As GCC explained (Pet. 16-17), because email service is *not* provided for, it is inconsistent with the methods of service authorized by the Hague Service Convention.

CIMSA argues (BIO 21) that the Hague Service Convention does not apply because the email to GCC's counsel constitutes service within the United States, but this argument is legally baseless. The Tenth Circuit *rejected* the idea that the email here constituted service *inside* the United States. App. 44a-45a. Otherwise, the service would be improper under Rule 4(f)(3), which allows alternative service only upon "an Individual in a Foreign Country" "at a place not within any judicial district of the United States." Fed. R. Civ. P. 4(f). CIMSA suggests (BIO 24) that the same service can somehow be considered outside the United States for purposes of Rule 4(f)(3) but within the United States for purposes of the Hague Service Convention. But as GCC explained (Pet. 20 & n.6), under *Volkswagenwerk*, domestic law determines when service is "valid and complete" for purposes of the Hague Service Convention. 486 U.S. at 707. Accordingly, if service were complete upon delivery of the email in the United States, then Rule 4(f) would necessarily be inapplicable and incapable of authorizing the service at issue; *only* once service is deemed to occur *outside* the United States does Rule 4(f) come into play, and so does the Hague Service Convention.

Rule 4(f) cannot plausibly be interpreted as allowing an end run around the Hague Service Convention by pretending that service is abroad solely for purposes of the Rule but not otherwise. Indeed, this approach would nearly nullify the Hague Service Convention,

as its careful procedures could almost always be circumvented just by serving U.S. counsel. The only exception would be cases where foreign corporations refuse to appear in U.S. court. Such a perverse view of the law would incentivize refusal to appear and improperly punish foreign corporations that properly assess and potentially contest service with advice from U.S. counsel. Pet. 22 & n.8.[1]

CIMSA also errs in attempting (BIO 21) to equate service on a domestic subsidiary in *Volkswagenwerk* with service on U.S. counsel here. *Volkswagenwerk* did not consider Rule 4(f)(3) it was a state case and because, "under state law," the defendant's "domestic subsidiary . . . [was] the foreign corporation's involuntary agent for service of process." 486 U.S. at 696. There is no argument here that GCC's U.S. counsel is similarly situated to serve as its agent for service of process under any law.

Finally, CIMSA is demonstrably wrong in asserting (BIO 23) that no authority rejects the idea of service on U.S. counsel under Rule 4(f)(3). Numerous courts have so held. *See, e.g.*, *Convergen Energy LLC v. Brooks*, 2020 WL 4038353, at *7-9 (S.D.N.Y. July 17, 2020); *In re Auto. Parts Antitrust Litig.*, 2017 WL 10808851, at *2 (E.D. Mich. Nov. 2, 2017); *Codigo Music, LLC v. Televisa S.A. de C.V.*, 2017 WL 4346968, at *13 (S.D. Fla. Sept. 29, 2017); *Freedom Watch, Inc. v. Org. of Petroleum Exporting Countries (OPEC)*, 107

[1] CIMSA asserts (BIO 24-25) that Rule 4(f)(3) would be meaningless under GCC's view because the "other means" of service would always need to be authorized by the Hague Service Convention, but CIMSA ignores that many countries are not signatories to the Convention. That Rule 4(f)(3) has restricted application for signatory countries follows from the Rule's express limitation to means "not prohibited by international agreement."

F. Supp. 3d 134, 137-39 (D.D.C. 2015); *Drew Techs., Inc. v. Robert Bosch, L.L.C.*, 2013 WL 6797175, *1-4 (E.D. Mich. Oct. 2, 2013).

C. CIMSA Fails To Show Any Problem With Using This Case As A Vehicle To Resolve The Conflict

CIMSA relies heavily (BIO 15-20) on the idea that this case is an improper vehicle to resolve the conflict because the email here went to U.S. counsel rather than to the foreign company directly. But this distinction is inconsequential: it makes no difference to the question presented of whether email service violates the Hague Convention. By no interpretation does the Hague Convention *prohibit* email service on foreign companies but *authorize* email service on their domestic counsel. Instead, CIMSA's argument is really that service on U.S. counsel presents an *additional* question of whether the Hague Convention applies at all to an email on U.S. counsel. As discussed above, however, the Hague Service Convention applies for the same reason Rule 4(f) applies—both are triggered once service exits the United States. And the Tenth Circuit correctly analyzed service as occurring abroad for purposes of Rule 4(f), at which point the question for this Court is simply whether such service can validly proceed via email to counsel consistent with the Hague Convention.

In any event, the particular scenario of email service on U.S. counsel—including any implications of Rule 4(f)—is especially worthy of review. As CIMSA notes (BIO 21-22), many of the cases authorizing email service involve this exact scenario. *See also, e.g.*, *Vanderhoef v. China Auto Logistics Inc.*, 2019 WL 6337908, at *4 nn.50-52 (D.N.J. Nov. 26, 2019) (citing

numerous cases); *Narbut v. Manulife Fin. Corp.*, 2020 WL 3577939, at *6 (D. Mass. July 1, 2020) (same).

This scenario also represents the most troubling use of email service to evade the Hague Service Convention. Just as a party does not accede to jurisdiction by contesting jurisdiction, it is well established that a party should not be deemed to accede to service simply by appearing to contest service. Pet. 22 & n.8. Yet that is exactly what occurred here and what continues to occur in many other cases where the appearance of U.S. counsel is being used to effect service. CIMSA's only response (BIO 20 n.5) is its refrain that the Hague Service Convention does not apply at all. That argument is legally erroneous for the reasons discussed above and it would effectively gut the detailed procedures of the Hague Service Convention: Only those parties that never retain counsel or appear could benefit from the Hague Service Convention, as their reward for shirking the U.S. legal system altogether. Such an approach is unworthy of our courts and undermines the rule of law.

Finally, CIMSA identifies no other vehicle concern in this case. While GCC noted (Pet. 7-8) that a Rule 60(b) motion to vacate the judgment was pending in district court when the petition for certiorari was filed, that motion has since been denied. *See* Dist. Ct. Dkt. 214. And while GCC has filed a notice of appeal from that order on May 28, 2021, *see* Dist. Ct. Dkt. 215, GCC will voluntarily dismiss that appeal if (and only if) this Court grants certiorari on the issue of whether service was proper. As such, this Court can be assured that granting certiorari will enable it to decide the question presented on its merits.

II. CIMSA FAILS TO REFUTE THAT, IN THE ALTERNATIVE, THIS COURT SHOULD GVR IN LIGHT OF *FORD*

The Court should alternatively GVR on the second question presented in light of *Ford*. *Ford* creates at least a reasonable probability that the Tenth Circuit would reconsider its reasoning as to personal jurisdiction. Notably, the Tenth Circuit ultimately held GCC to be susceptible to jurisdiction specifically as to a claim between two foreign plaintiffs about enforcement of a foreign arbitration regarding a contract that was signed abroad, performed abroad, and allegedly breached abroad, resulting in alleged injury abroad. The warrant for remand is especially clear given that the Tenth Circuit itself called personal jurisdiction a "close question" and noted the lack of guidance from this Court on the proper test for linking forum contacts to the claim. App. 27a.

First, *Ford* casts substantial doubt on the Tenth Circuit's premise that it sufficed that the U.S. contacts—discussions between the parties about the contract (App. 29a-30a, 57a-59a)—had "causative features" and "form part of the narrative determining when and how GCC's breach occurred." App. 30a. CIMSA argues (BIO 29) that the Tenth Circuit's indication of some causal connection necessarily suffices because "*Ford Motor* arguably does not require any causal analysis." But *Ford*'s rejection of a strict causation requirement "does not mean anything goes," 141 S. Ct. at 1026, and indeed, *Ford*'s test "may also sometimes turn out to be more demanding" than a causation test, *id.* at 1035 (Gorsuch, J., concurring in the judgment).

Regardless, *Ford* did not suggest that the proper test is whether the contacts are "part of the narrative."

To the contrary, it held that the contacts must not be "random," "isolated," or "sporadic." 141 S. Ct. at 1025, 1028 n.4 (quotation marks omitted). The Tenth Circuit did not grapple with any such terms, and the U.S. contacts here seem to answer to such description: they concern only a handful of meetings in the United States where no agreement was made or breached.

Further, this Court held in *Ford* that the specific jurisdiction analysis should prevent forum shopping by focusing on the interest of the forum, and in particular the place of injury. *See id.* at 1025 ("The law of specific jurisdiction thus seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy.") (internal citation omitted). Here, there is no denying that the countries most interested in the litigation are Mexico, where GCC is located, and Bolivia, where CIMSA is located, and where the contract was signed and allegedly breached, and also where the arbitration occurred under Bolivian law. App. 5a-7a, 29a, 34a, 37a. That equates to the precise scenario where this Court noted that jurisdiction would *not* exist, *i.e.*, where "the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries" and "the suit's only connection with the State is that a former owner once (many years earlier) bought the car there." 141 S. Ct. at 1030.

The Tenth Circuit also recognized that the United States did not have much interest in the suit, but held that the generic interest in enforcing arbitration awards sufficed. App. 37a. Yet it did not consider the "jurisdiction-allocating function" of the specific jurisdiction analysis, *Ford*, 141 S. Ct. at 1030 (quotation marks omitted), or the other analysis in *Ford*, discussed above, which calls into question whether

this generic interest suffices notwithstanding the much greater interests of foreign countries.

Second, *Ford*'s reasoning calls into question the Tenth Circuit's holding that it suffices for jurisdiction if the "injuries" arise from forum contacts, even if the claim does not. App. 24a (quotation marks omitted). As GCC explained (Pet. 27), this approach conflicts with *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1780-81 (2017), which held: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue," *i.e.*, the claims "that establish[] jurisdiction" in the U.S. court. CIMSA argues (BIO 30) that the Tenth Circuit found such a connection, but CIMSA disregards the key point that the connection was solely to "the claim that led to the arbitration," *not* to the claim in district court to enforce the arbitration.

Rather than finding requisite connection to the claim at issue, the Tenth Circuit held that *Bristol-Myers Squibb* did not change the "jurisdictional landscape," App. 24a, but *Ford* reiterated that the necessary connection must be to "the plaintiffs' claims," and that this is "the essential foundation of specific jurisdiction." 141 S. Ct. at 1028 (quotation marks omitted). This development, too, casts substantial doubt on the Tenth Circuit's refusal to consider the connection to the claim, and further warrants a GVR.

CONCLUSION

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

Respectfully submitted,

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