Tenth Circuit Clarifies Standard for Establishing Personal Jurisdiction in Cases Enforcing Foreign Arbitration Awards

Plaintiffs attempting to enforce foreign arbitration awards in U.S. courts against foreign defendants face numerous significant hurdles. Putting aside issues of whether the award itself is enforceable, plaintiffs usually must establish that the court has specific jurisdiction over the defendant. This means the plaintiffs' injuries must "arise out of or relate to" defendants' suit-related contacts with the forum. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985). In cases involving the enforcement of foreign arbitration awards, there has been an open question of what constitutes a "suit-related" contact for establishing specific jurisdiction: is it the defendant's contacts with the forum that arose during the course of the arbitration or the defendant's contacts with the forum in the underlying dispute that was the subject of the arbitration? If the former, U.S. courts effectively would be closed to plaintiffs seeking to enforce foreign arbitration awards against foreign defendants.

On August 7, 2020, in *Compania de Inversiones Mercantiles, S.A.* v. *Grupo Cementos de Chihuahua S.A.B. de C.V.*, No. 19-1151, 2020 WL 4743833 (10th Cir. 2020)[1] ("*CIMSA*"), the United States Court of Appeals for the Tenth Circuit joined the Second, Third, Fourth, and Ninth Circuits in holding that courts must look to defendants' contacts with the forum that arose during the underlying dispute. If this trend continues, plaintiffs will have the ability to enforce foreign arbitration awards against foreign defendants in U.S. courts but only in limited circumstances where there is a sufficient connection between the underlying dispute and the forum.

I. Background on Specific Jurisdiction in the Enforcement of Foreign Arbitral Awards

The enforceability of foreign arbitration awards in the U.S. is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 9 U.S.C.A. §§ 201-208. However, a plaintiff still must establish that the U.S. court in which it sued to enforce an arbitration award has personal jurisdiction over the defendant. *See Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002) ("We hold that neither the [New York] Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.").[2]

The exercise of personal jurisdiction must be consistent with due process, which requires "only that in order to subject a defendant to [personal jurisdiction in the forum State], he have certain minimum contacts with it 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 (1945). Typically in cases brought against foreign defendants, this requires a showing of specific jurisdiction. The issue of whether a forum state may assert specific jurisdiction over a nonresident defendant "focuses on the relationship among the defendant, the forum, and the litigation." *Walden* v. *Fiore*, 571 U.S. 277, 277 (2014). Courts must determine "whether there was some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 924 (2011).

In cases involving the enforcement of foreign arbitration awards, there has been an open question as to which "contacts" with the forum should be considered in determining whether the court has jurisdiction over the

[1] Unless otherwise specified, quoted statements in this memorandum are taken from this decision.

[2] *See also Frontera Res. Azerbaijan Corp.* v. *State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 398 (2d Cir. 2009); *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748 (5th Cir. 2012), as revised (Jan. 17, 2013).

defendant—i.e., are the requisite contacts with the forum limited to those that arose during the course of the arbitration or those in the underlying dispute that was the subject of the arbitration? The Second, Third, Fourth, and Ninth Circuits have all held that courts should look at the defendants' contacts with the forum that occurred in connection with the underlying dispute.[3] No court has reached a contrary conclusion.

Courts also have had to consider whether the relevant "forum" for jurisdictional purposes is the state where the case was filed or the United States as a whole. While in most cases the forum is the state where the lawsuit is brought, for cases arising under federal law, such as those involving the enforcement of foreign arbitration awards under the New York Convention, Federal Rule of Civil Procedure 4(k)(2) permits a federal court to consider the defendant's contacts with the United States as a whole, as long "as the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2). The circuit courts are divided on which party has the initial burden to prove that the defendant is "not subject to jurisdiction in any state's courts of general jurisdiction." *Id*. The majority of circuits have held that the defendant has the initial burden to identify a state where it is subject to suit.[4] The First and Fourth Circuits, however, have held it is the plaintiff's burden to certify the defendant is not subject to jurisdiction in any particular state.[5]

II. *CIMSA* Factual and Procedural Background

The arbitration award considered in *CIMSA* arose from a contract dispute between a Bolivian company, Compañía 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"). In 2005, the parties executed a shareholder agreement (the "2005 Shareholder Agreement") as part of a joint venture relating to a Bolivian cement company, Sociedad Boliviana de Cemento, S.A. ("SOBOCE"). The agreement was negotiated in Miami, Florida. Under the 2005 Shareholder Agreement, either party could transfer their shares in SOBOCE to a third-party after a five-year lock-up, but the non-selling party had a right of first refusal, provided the non-selling party offered to purchase the shares on the same or better terms. In 2009 and 2010, CIMSA and GCC met multiple times in Miami to discuss how CIMSA could exercise its right of first refusal once GCC wanted to sell its SOBOCE shares. GCC decided not to sell its shares, and the parties signed a new shareholder agreement in 2010 ("2010 Shareholder Agreement). In 2011, after the Bolivian government expropriated part of SOBOCE's business that prevented the closing of the 2010 Shareholder Agreement, CIMSA and GCC met in Houston, Texas to negotiate new terms. The parties subsequently drafted the 2011 Shareholder Agreement using New York counsel and New York law.

In 2011, at the same time that CIMSA and GCC were drafting the 2011 Shareholder Agreement, GCC received a proposal from a Peruvian company to buy GCC's SOBOCE shares. CIMSA exercised its right of first refusal and offered to buy GCC's shares but on a longer payment schedule than offered by the Peruvian company. GCC agreed to CIMSA's new terms and declined the Peruvian company's offer. However, right before CIMSA's

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[3] *See Sole Resort, S.A. de C.V.* v. *Allure Resorts Mgmt., LLC*, 450 F.3d 100 (2d Cir. 2006); *Telcordia Tech Inc.* v. *Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Base Metal Trading, Ltd.* v. *OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 215 (4th Cir. 2002); and *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123–24 (9th Cir. 2002).

[4] *See 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).

[5] *United States* v. *Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999); *Base Metal Trading, Ltd.* v. *OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 215 (4th Cir. 2002).

purchase of GCC's shares, GCC demanded that CIMSA place a greater percentage of its shares in trust in exchange for the longer payment terms. CIMSA rejected GCC's changes and proposed a reversion of terms to those that had been originally agreed to by the parties. In light of the longer payment schedule, GCC viewed CIMSA's offer as inferior to that of the Peruvian company and subsequently sold its shares to the Peruvian company.

Following this disagreement, CIMSA invoked the arbitration clause in the 2005 Shareholder Agreement. The arbitration proceeded in Bolivia and, in September 2013, the tribunal held that GCC breached the right of first refusal provision. The arbitration decision took a winding path through the Bolivian courts, with both parties raising multiple appeals.

In September 2015, CIMSA filed an action to enforce the arbitration award in the United States District Court for the District of Colorado, pursuant to the New York Convention. CIMSA filed in Colorado due to GCC's alleged business contacts there and the presence of its general counsel in Colorado. GCC moved to dismiss, among other reasons, for lack of personal jurisdiction. The district court held that it had personal jurisdiction over GCC based on GCC's contacts with the U.S. in the underlying dispute. GCC appealed.

III. Tenth Circuit Affirms the District Court's Finding of Personal Jurisdiction Over GCC

On appeal, GCC argued the district court lacked personal jurisdiction because the only contacts it had with the forum that could be considered were those related to the arbitration and not those related to the underlying contract dispute. The Tenth Circuit rejected this argument, holding that "contacts relating to the underlying claim (i.e., the formation and alleged violation of the 2005 Shareholder Agreement) are pertinent." Key to this decision is that the exercise of specific jurisdiction must comport with due process. "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." Because the enforcement of an arbitration does not involve "injuries," the Tenth Circuit reasoned, the court must look to the underlying dispute for contacts with the forum that led to injuries. "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."

In reaching its conclusion, the Tenth Circuit also considered the substantive and procedural features of an arbitration award confirmation. Because enforcement of a foreign arbitration award is a "summary proceeding" and not intended to "involve complex factual determinations," "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."

The Tenth Circuit also had to consider whether the relevant forum was the state where the suit was brought, Colorado, or the United States as a whole. CIMSA, relying on Rule 4(k)(2), argued that for claims arising under federal law, such as the New York Convention, courts can consider a defendant's contacts with the United States as a whole. GCC argued that the initial burden lies on the plaintiff to establish jurisdiction, and "there is no evidence (from CIMSA or otherwise) that GCC is not subject to the [general] jurisdiction of any of the 50 states" so as to warrant the application of Rule 4(k)(2). Even though GCC forfeited any arguments against applying Rule 4(k)(2)'s nationwide contacts test, the court considered GCC's position and rejected it.

Having never definitively answered the question before, the Tenth Circuit adopted the majority rule endorsed by the Fifth, Seventh, Ninth, Eleventh, District of Columbia, and Federal Circuits—that the burden to

refute Rule 4(k)(2) rests with the defendant rather than the plaintiff. In reaching this decision, the Tenth Circuit relied on the rationale from *ISI Int'l, Inc.* v. *Borden Ladner Gervais LLP*, 256 F.3d 548, 551–52 (7th Cir. 2001), whereby "[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. . . . 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)." The Tenth Circuit acknowledged that placing the burden on the defendant is more aligned with the rationale behind the enactment of Rule 4(k)(2).

Having decided *what* contacts with the forum matter and what the relevant forum is, the Tenth Circuit also addressed *how closely* CIMSA's injury had to "arise out of or relate to" such contacts. *Burger King Corp*, 471 U.S. at 472. Here again, the circuit courts are divided. "Some circuits require that the in-forum conduct to be the proximate cause of plaintiff's injuries, while others find the standard satisfied if the defendant's activities are the 'but for' cause of those injuries." *SPV Osus Ltd.* v. *UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018). Indeed, this issue is currently before the Supreme Court in *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, 2019 MT 115, 395 Mont. 478, 443 P.3d 407, *cert. granted*, 140 S. Ct. 917, 205 L. Ed. 2d 519 (2020).

In *CIMSA*, the Tenth Circuit adopted the proximate causation standard, which "turns on whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." The court then found that GCC's contacts satisfied the proximate causation test. Specifically, it found that multiple meetings were held in the United States to discuss the 2005 Shareholder Agreement, the revisions to the shareholder agreement in 2011, and CIMSA's counter-offer to GCC's Peruvian offer to buy its shares of SOBOCE. These 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."

IV. Implications

In *CIMSA*, the Tenth Circuit joined the growing number of circuits that have held that plaintiffs seeking to enforce foreign arbitration awards against foreign defendants can establish jurisdiction through a defendant's contacts with the forum that arose from the dispute that lead to the foreign arbitration and not solely on those contacts that arose during the course of the foreign arbitration. This trend, if it continues, ensures that U.S. courts will remain a viable forum for plaintiffs to enforce foreign arbitral awards against foreign defendants. Even so, the path through U.S. courts is challenging because plaintiffs still must demonstrate a sufficient connection between the dispute and the defendants' contacts with the United States.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz at 212.701.3981 or amintz@cahill.com; Grace McAllister at 212.701.3343 or gmcallister@cahill.com; or email publications@cahill.com.