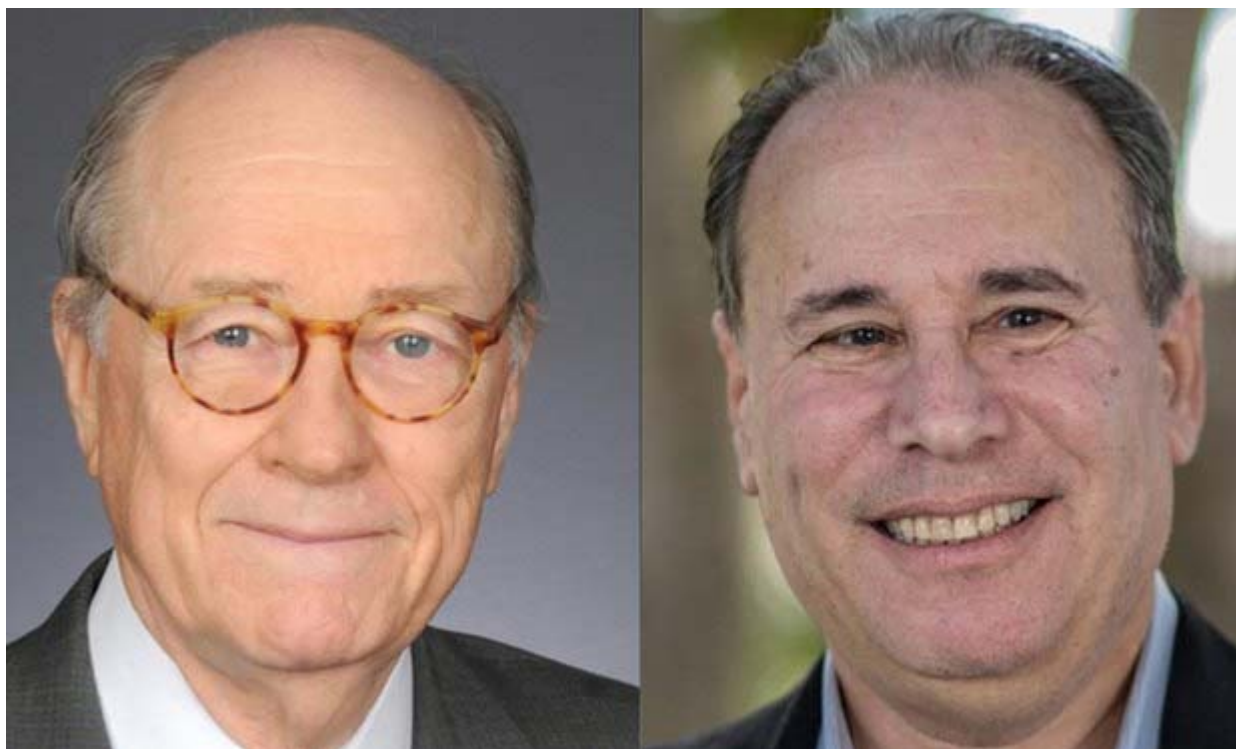


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Establishing Personal Jurisdiction in Enforcing an International Arbitration Award

In their International Litigation column, Lawrence W. Newman and David Zaslowsky look at the question of how courts decide the issue of personal jurisdiction in the context of enforcing international arbitration awards.

By **Lawrence W. Newman and David Zaslowsky** | November 19, 2020 at 12:15 PM



Numerous federal circuit and district courts have held that, for foreign arbitral awards to be enforced in the United States there must be, in addition to subject-matter jurisdiction under Chapter 2 of the Federal Arbitration Act, personal jurisdiction over the award debtor or quasi in rem jurisdiction to the extent of the debtor's property in the jurisdiction. See *Frontera Res. Azer. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393 (2d Cir. 2009). A Circuit Court has recently addressed whether, in considering relevant contacts with the forum in a specific personal jurisdiction analysis, courts should analyze the contacts relating to the arbitration or those concerning the transaction underlying the arbitration out of which the award arose. This is the issue we discuss in today's column.

Since *International Shoe Co. v. Washington*, the touchstone due process principle has been that, before a court may exercise jurisdiction over a person or an entity, that person or entity must have sufficient "minimum contacts" with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. This principle presaged the development of two categories of personal jurisdiction: general and specific. General, all-purpose jurisdiction permits a court to hear any and all claims against a defendant. Specific jurisdiction, on the other hand, accords adjudicatory authority only over issues that arise out of or relate to the defendant's contacts with the forum.

We previously addressed how the Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), was a sea change in personal jurisdiction jurisprudence. See *Home Sweet Home and General Jurisdiction*, NYLJ,

March 20, 2014. After *Daimler*, determining general jurisdiction over an entity has been a relatively simple matter-it exists at a defendant's place of incorporation and principal place of business. But determining specific jurisdiction entails a more fact-intensive inquiry.

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), the Tenth Circuit recently had occasion to address the question of which contacts are the relevant ones for specific jurisdiction in the context of confirming an international arbitration award. That decision arose out of a dispute between a Bolivian company, *Compañía de Inversiones Mercantiles S.A. (CIMSA)*, and two Mexican companies, *Grupo Cementos de Chihuahua, S.A.B. de C.V.* and *GCC Latinoamerica, S.A. de C.V.* (collectively *GCC*) relating to 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, *Sociedad Boliviana de Cemento, S.A. (SOBOCE)*. *GCC* sold its *SOBOCE* shares to a third party after taking the position that *CIMSA* had failed to properly exercise its right of first refusal. In 2011, *CIMSA* initiated an arbitration proceeding in Bolivia. The arbitration tribunal determined that *GCC* had violated the contract and the parties' expectations and awarded *CIMSA* tens of millions of dollars for *GCC*'s breach.

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 U.S. District Court for the District of Colorado. The district court rejected *GCC*'s challenges to personal jurisdiction, holding (among other things) that (1) it was appropriate to consider in the aggregate all of *GCC*'s contacts with the United States; (2) *CIMSA*'s injury arose out of *GCC*'s contacts; and (3) exercising jurisdiction under the circumstances was consistent with fair play and substantial justice. *GCC* appealed to the Tenth Circuit.

GCC argued that the guiding principle for the jurisdictional analysis was the Supreme Court's explanation in *Bristol-Myers Squibb v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017), that "[i]n order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum." Here, the only claim was for confirmation of the Bolivian arbitral award. The bases for that claim were the existence of the arbitral award, and the assertions that, since Bolivia is a signatory to the New York Convention, the award is final and binding, and that *GCC* had failed to fulfill its payment obligations under the award. Moreover, as to the merits of that confirmation challenge, *GCC* opposed *CIMSA*'s confirmation petition solely on the ground that the award had been set aside and was therefore not binding, an issue that turned solely on the legal effect of a Bolivian judicial proceedings setting aside the award. Thus, according to *GCC*, there was no specific jurisdiction to permit the court to consider the matter since the only contacts for specific jurisdiction purposes were those relating to the confirmation of the foreign arbitral award.

CIMSA's counter-argument was that the proper test was whether *GCC*'s contacts arose out of the underlying dispute, not the arbitral proceedings. It pointed to a case in which the Second Circuit reversed a decision that had adopted *GCC*'s argument and held that the district court's jurisdictional inquiry should have properly included an examination of the parties' activities related to the contract underlying the arbitrated dispute. As the Second Circuit explained, "[a]ny arbitration proceeding is ... an extension of the parties' contract with one another, a mechanism through which they attempt to ensure compliance with the terms of that contract. Without the contract, the arbitration, and its resultant judgment, a subsequent challenge to that judgment never could exist." *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt.*, 450 F.3d 100, 104 (2d Cir. 2006).

The Tenth Circuit sided with *CIMSA* in its jurisdictional argument. The court made two main points. First, it referred to the principle that 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 that were purposefully directed at the forum. In a proceeding to enforce an arbitral award, there is no conventional "injury" and thus the analysis only makes sense if applied with an eye toward the underlying dispute, since that is the proceeding concerning the alleged "injury."

The Tenth Circuit's second point was based on looking at an award-enforcement case in the sense of both substance and procedure. As to the former, 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 Convention. As to the latter, 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. The court then concluded:

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.

The Tenth Circuit then went on to agree with CIMSAs that there were sufficient contacts with the relevant forum in connection with the claim that led to the arbitration and that there was, accordingly, a basis for personal jurisdiction.

Examination of this issue leads to consideration of the general role of U.S. courts in the enforcement of arbitral awards. CIMSAs argued that GCC's focus on the arbitration proceeding itself, rather than on the underlying dispute in the arbitration, would frustrate the primary purpose of the New York Convention of facilitating the enforcement of foreign arbitral awards by signatory states. In almost every action to confirm a foreign award in U.S. courts, the award will have been issued outside of the United States. If U.S. courts could only exercise general, and not specific, jurisdiction in New York Convention cases, then, according to CIMSAs, the ability of U.S. courts to enforce foreign awards would be nearly eliminated. But should that really be a concern as a practical matter? U.S. companies would still be subject to general jurisdiction at their places of incorporation and principal place of business. And, award creditors seeking confirmation of an award against foreign award debtors in the United States would most likely do so where the award debtors have assets. In such situations, presence of the assets in the forum would be the basis for quasi-in-rem jurisdiction, regardless of the specific jurisdiction analysis.

It should be noted that the Tenth Circuit's decision should not be considered the last word on the subject. A party arguing in favor of the narrower interpretation may point out, as did GCC, that the Second Circuit's *Sole Resort* decision was prior to the Supreme Court's decision in *Bristol Meyers* and the specific "arising out of" language included therein. Furthermore, at least one district court has considered the same issue, after *Bristol Meyers*, and ruled the other way. See *Sharp v. Hisense USA*, 292 F. Supp. 3d 157, 170-71 (D.D.C. 2017). In rejecting the argument by Sharp that the defendant Hisense's sale of televisions in the forum was a relevant jurisdiction connection, the court explained that "Sharp's Complaint is not really about Hisense's sale of televisions here; rather, Plaintiffs' grievances are grounded in the emergency order [of a foreign arbitrator] itself, which has no connection to the forum."

It is interesting to contrast the CIMSAs decision with another situation in which, for purposes of deciding the specific jurisdiction issue, the court addressed whether to conflate the specific relief being sought with the substance of the underlying dispute. In *re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019) involved a petition under 28 U.S.C. §1782, which authorizes discovery from non-parties in aid of foreign proceedings. The petitioner argued that, in the personal jurisdiction analysis, the due-process owed to a non-party was less than that owed to party against which one sought to establish liability. The Second Circuit declined to so hold, saying "we think it enough for purposes of due process in these circumstances that the nonparty's contacts with the forum go to the actual discovery sought rather than the underlying cause of action."

Thus, the Second Circuit held that, in the §1782 context, one does not look at the underlying dispute in determining specific jurisdiction. The Tenth Circuit held that, in the context of enforcing an arbitral award, one does determine specific jurisdiction based on contacts arising from the underlying dispute. The results do not

seem consistent. But in one way important way they are. In both cases, the court decided the specific jurisdiction issue in a way that made it easier for the plaintiff to establish personal jurisdiction.

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