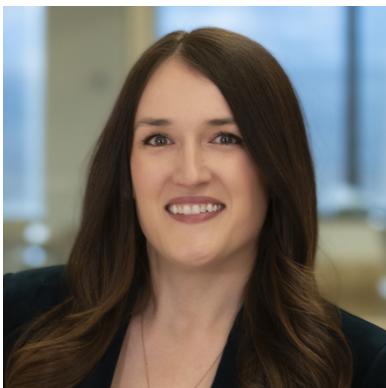




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# Tenth Circuit Holds That Foreign Arbitration Award Still Subject to Confirmation in the US Despite Foreign Court's Post-Confirmation Annulment of Arbitration Award

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**In 'Compañía De Inversiones Mercantiles S.A. v. Grupo Cementos De Chihuahua S.A.B. De C.V.', the Tenth Circuit affirmed the district court's refusal to vacate an earlier U.S. judgment confirming a foreign arbitration award.**

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In *Compañía De Inversiones Mercantiles S.A. v. Grupo Cementos De Chihuahua S.A.B. De C.V.*, 2023 U.S. App. LEXIS 602, \_\_\_ F.4th \_\_\_ (10th Cir. Jan. 10, 2023), the Tenth Circuit affirmed the district court's refusal to vacate an earlier U.S. judgment confirming a foreign arbitration award. After the District of Colorado originally confirmed the arbitration award, a Bolivian court annulled that same award. Nonetheless, the Tenth Circuit held that the district court acted within its discretion in denying a F.R.C.P. 60(b)(5) motion to vacate the U.S. judgment.

## **Original Shareholder Agreement**

Grupo Cementos de Chihuahua (GCC) and Compañía De Inversiones Mercantiles S.A. (CIMSA) were two principal shareholders in Sociedad Boliviana de Cemento, S.A. (SOBOCE), a Bolivian cement company. GCC and CIMSA entered into a shareholder agreement (Shareholder Agreement). The Shareholder Agreement required any disputes to be resolved through international arbitration under the Inter-American Commercial Arbitration Commission. The parties agreed that the arbitration would occur in Bolivia.

## **Original Arbitration**

Following a dispute under the Shareholder Agreement, CIMSA initiated arbitration proceedings in Bolivia. In September 2013, the Bolivian arbitration tribunal issued its merits ruling, concluding that GCC breached the Shareholder Agreement (Merits Ruling). Later, in April 2015, the Bolivian arbitration tribunal awarded approximately \$34 million in damages and \$2 million in fees and costs, all at 6 percent interest, to CIMSA

(Damages Award). After the Merits Ruling and Damages Award, GCC sought to annul both awards in Bolivia while Cimsa sought to confirm them in the United States.

### **GCC's Efforts To Annul the Merits and Damages Awards in Bolivia**

A Bolivian trial court denied GCC's request to annul the Merits Award in August 2015. Through "an amparo" (a type of appellate review), GCC asked a "Guarantee Court" to reverse the trial court's decision on the grounds that the trial court judge violated its due process rights and the right to a defense. The Guarantee Court agreed with GCC, remanding the matter back to the Bolivian trial court for further proceedings. Cimsa appealed to the PCT (a court that reviews decisions from the Guarantee Courts). The PCT reversed the Guarantee Court's decision, concluding that the trial court had not violated GCC's rights.

While GCC and Cimsa were litigating over annulment of the Merits Award, a different Bolivian trial court judge was considering GCC's request to annul the Damages Award. On October 9, 2015, that trial court judge granted GCC's request, thus annulling the Damages Award. Cimsa filed a first and second amparo, seeking to reverse the trial court's decision to annul the Damages Award, both of which the Guarantee Court denied. In late 2016, Cimsa appealed to the PCT, which denied the first amparo but granted the second amparo, thus vacating the trial court's decision to annul the Damages Award. On remand, in the spring of 2017, after a series of procedural filings, the trial court judge "certified that the Damages Award proceedings were pending but declined to certify whether the Damages Award was binding." *Id.* at \*13.

### **Cimsa's Efforts To Confirm the Damages Award in the United States**

In September 2015, Cimsa sought to confirm the arbitration award in the U.S. District Court for the District of Colorado under the New York Convention, "a multilateral treaty on international arbitration" with the "principal purpose ... to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and ... enforced." *Id.* at \*21 (quotations omitted). Given difficulties in serving GCC, however, Cimsa had to file a renewed motion to confirm the Damages Award in June 2018. At that time, GCC challenged whether the District of Colorado had personal jurisdiction and argued that the court could not confirm the Damages Award because (1) "Bolivian courts had nullified the Merits Award and (2) annulment proceedings regarding the Damages Award were ongoing in Bolivia." *Id.* at \*15. The district court rejected all of GCC's arguments and confirmed the Damages Award in March 2019.

### **GCC's Renewed Efforts To Annul the Damages Award in Bolivia**

In May 2019, after the District of Colorado confirmed the arbitration award, GCC sought additional review of the Damages Award in Bolivia. Through a series of procedural steps, GCC ultimately convinced a new PCT to reverse the earlier Bolivian orders rejecting GCC's efforts to annul the Damages Award. Following the PCT's new ruling, the Bolivian trial court

“issued an ex parte order on November 5, 2020, reinstating her decision to annul the Damages Award and returning the matter to” the Arbitration Tribunal “to issue a new damages award.” Id. at \*17. The Bolivian trial court also denied Cimsa’s request to appeal.

### **GCC’s Efforts To Vacate the District of Colorado’s Confirmation Order**

GCC then returned to the District of Colorado and moved under Federal Rule of Civil Procedure 60(b)(5) to vacate the judgment confirming the Damages Award. The district court denied the motion and ordered GCC to turn over certain assets located in Mexico to the court registry. GCC appealed to the Tenth Circuit.

### **The New York Convention**

“The New York Convention contemplates that an arbitral award may be issued in one country but confirmed in another country.” Id. at 21. “A ‘primary jurisdiction’ is the country where the arbitral award was issued.” Id. And “[a] ‘secondary jurisdiction’ is the country where confirmation of that award is sought.” Id. at 21-22. “The Convention states that ‘[e]ach Contracting State shall recognize arbitral awards as binding.’” Id. “A secondary jurisdiction thus must generally confirm an arbitral award subject to certain defenses.” Id.

In particular here, a “secondary jurisdiction may refuse to recognize and enforce an award if the party opposing the confirmation establishes that … the award has been set aside or suspended by a competent authority in the primary jurisdiction.” Id. at 22 (alternations and quotations omitted). Additionally, the secondary jurisdiction can refuse to confirm the award if the “recognition or enforcement of the award would be contrary to the public policy of that country.” Id. at 22-23.

### **Rule 60(b)(5)’s Standard**

Under Rule 60(b)(5), “the court may relieve a party … from a final judgment” if that judgment “is based on an earlier judgment that has been reversed or vacated.” “But a court is not required to set aside a judgment ‘simply because it was based on a prior judgment that has later been reversed.’” Id. (quoting *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1241 (10th Cir. 2010)). Instead, Rule 60(b)(5) relief is intended to be “extraordinary” and “limited to exceptional circumstances” Id. (quotations omitted). “Rule 60(b) gives the court a grand reservoir of equitable power to do justice in a particular case.” Id. (quotations omitted).

On appeal, an order denying a Rule 60(b)(5) motion is reviewed for an abuse of discretion.

### **The Tenth Circuit’s Opinion**

After analyzing the different considerations under the New York Convention, the Tenth Circuit explained that “[w]hen the prevailing party seeks confirmation and the nonprevailing party presents the defense that

the foreign jurisdiction has set the arbitral award aside, the district court must perform a weighing analysis, generally according comity to the foreign annulment order unless doing so violates United States public policy.” Id. at \*33. “When the nonprevailing party moves the district court under Rule 60(b)(5) to vacate the court’s previous confirmation judgment on the ground that the movant obtained an annulment order from the foreign jurisdiction, additional considerations come into play.” Id. “[T]he moving party must provide ‘highly convincing’ evidence that it is entitled to this extraordinary remedy and that its conduct as a matter of equity should allow vacatur.” Id. at 33–34.

The Court explained “that when a court has been asked to vacate an order confirming an arbitral award that has later been annulled, it may balance against comity considerations (1) whether the annulment is repugnant to U.S. public policy or (2) whether giving effect to the annulment would undermine U.S. public policy.” Id. at 42. “Although the district court here may have found the 2020 Bolivian orders were not repugnant, it did not legally err by considering whether giving effect to those orders through vacatur of its Confirmation Judgment would offend U.S. public policy.” Id.

Given this legal framework, the Tenth Circuit held “that the district court did not abuse its discretion” in denying the Rule 60(b)(5) motion because “(1) giving effect to the 2020 Bolivian orders would offend U.S. public policy and (2) GCC acted inequitably in the United States and Bolivian proceedings.” Id. at 48. The Tenth Circuit concluded this, in part, because “giving effect to” the later Bolivian orders annulling the Damages Award after earlier Bolivian courts had denied those same requests “would encourage proceedings without end.” Id. “The interests in the finality of judgments, respecting parties’ contractual expectations, and the U.S. policy favoring arbitral dispute resolution support the district court’s conclusion that vacatur of its Confirmation Judgment would violate U.S. public policy.” Id. at 55.

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