No. 13-11616

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GDG ACQUISITIONS, L.L.C.,

Plaintiff–Appellant,

v.

GOVERNMENT OF BELIZE,

Defendant–Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR APPELLANT GDG ACQUISITIONS, L.L.C.

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APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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GDG ACQUISITIONS, L.L.C.,
v.
GOVERNMENT OF BELIZE

Government of Belize

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument. The district court's decision to abstain from hearing this case on grounds of international comity is novel. Federal courts are duty-bound to exercise their jurisdiction in all but the rarest cases. Only once before has this Court approved abstention based on international comity despite the absence of a parallel proceeding in a foreign country. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). That case featured extraordinary facts involving a foundation set up by the United States and Germany to handle thousands of Holocaust-era claims, while this is an ordinary breach of contract case. Affirmance would mark a significant expansion of the doctrine of international comity. This case therefore merits close attention, and the Court would benefit from the opportunity to explore the important issues involved and sharpen the points of disagreement with counsel for the parties.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1330 because the defendant is a foreign state. Doc 1 – Pgs 2-5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is taken from the district court's final judgment, entered on March 28, 2013, disposing of the entire action and all claims. Doc. 51 (Appendix, Tab 3). Appellant's timely notice of appeal was filed on April 10, 2013. Doc. 52.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The parties' contract includes an exclusive forum selection clause mandating litigation in the district court, but the parties dispute whether the contract is binding and valid. Considering that exclusive forum selection clauses are presumptively enforced regardless of forum non conveniens principles, was the district court free to dismiss the case due to forum non conveniens without first determining whether the forum selection clause is enforceable?

2. The district court applied international comity prospectively and dismissed an ordinary contract dispute between an American company and a foreign government. Does international comity require this dismissal despite the powerful obligation of federal courts to exercise their jurisdiction and their strong interest in upholding citizens' contracts – particularly where the district court failed to consider whether the foreign government's consent to suit here affects the comity analysis?

INTRODUCTION

Appellant GDG Acquisitions, LLC is the assignee of a company that leased phone equipment to Appellee The Government of Belize. The lease obligated Belize to return the equipment years ago, but Belize continues on using it without payment. In the lease, Belize waived sovereign immunity and agreed to litigate disputes exclusively in a Florida federal court. But when GDG brought suit there, Belize alleged that its own Finance Minister signed the lease without authorization, voiding the waiver. GDG and Belize submitted voluminous factual materials to the district court on authorization and waiver, but the district court bypassed the issue entirely and instead dismissed based on forum non conveniens and international comity.

Neither of these grounds supports dismissal. Forum non conveniens does not apply where the parties have previously agreed on a mandatory and specific forum. The district court therefore had no choice but to determine whether the exclusive forum selection clause present in this case was authorized and valid, and if so enforce it in lieu of applying forum non conveniens. International comity is also inapplicable. Federal courts have a strict duty to exercise their jurisdiction, and this is just a garden-variety contract dispute about whether Belize will pay for equipment it leased, not a sensitive matter enmeshed in diplomatic relations. It is no exaggeration to

say that the decision below threatens the ability of American firms to do business with foreign governments and companies. If all it takes for a foreign party to renege on an agreement to litigate here is an untested allegation that its contract wasn't authorized, or a claim that the case affects foreign consumers, they can be expected to make the allegations regularly and evade their commitments whenever doing so seems advantageous.

The Court should reverse and remand with instructions to decide whether the contract was authorized and valid, and therefore whether the forum selection clause applies. If the clause is binding, the case must be heard here unless Belize can overcome the strong presumption of enforceability that attaches to all forum selection agreements. The Court should also reverse the dismissal based on international comity and hold that doctrine is inapplicable here, or it should at least remand for the district court to reconsider comity in light of the parties' agreement on the forum.

STATEMENT OF THE CASE

I. Statement of Facts

A. Belize's Lease of Phone Equipment

In 2002, Belize set out to reduce the cost of phone calls between its government offices. Doc 33 – ¶¶ 17-20. The calls were expensive because the existing national provider routed them through a public switch and billed

the government by the minute. *Id*. To lower costs, Belize's Budget Ministry decided to create an internal network linking government offices. *Id*. Ralph Fonseca, then the Minister of Finance and Budget Management, began negotiating with a Belizean company named International Telecommunications, Limited ("Intelco") to lease the necessary equipment, including telephones, cables, routers, and servers. Doc 32 – ¶ 6 (Appendix, Tab 6); Doc 31-2 – Pg 46; Doc 31-3 – Pg. 36.

Intelco and Belize negotiated their agreement in Florida and Washington, D.C. Doc 32 – ¶ 10; Doc 36 – ¶ 19. Glenn Godfrey, a former Attorney General of Belize, was an Intelco director who bargained for the company. Doc 32 – ¶ 6. Because the parties chose to finance the transaction through the International Bank of Miami, the bank became involved in preparing the equipment leases and financial agreements. *Id.* The parties ultimately reached agreement and Fonseca presented the documents to the Belizean cabinet, which unanimously approved them. Doc 33 – ¶¶ 26-29; Doc 35 – ¶ 18. Fonseca and Godfrey then met in Miami on December 18, 2002 with representatives of the International Bank of Miami to close the transaction. Doc 32 – ¶ 13.

The parties entered into a "Master Lease Agreement" obligating Intelco to lease the phone equipment to Belize in exchange for quarterly

payments of "rent" from 2003 through 2007 totaling $6,748.189.20. Doc 31-2 – Pgs 16-46 (Appendix, Tab 4). Through a "Purchase Agreement," Intelco simultaneously assigned these payments to the International Bank of Miami in exchange for a single discounted cash payment of $5 million from the bank. Doc 31-2 – Pg 5 (§§ 2.1 – 2.2) (Appendix, Tab 4). The bank also acquired a security interest in the equipment and an assignment of Intelco's rights and remedies against Belize under the lease in case of Belize's default. Doc 31-2 – Pgs 47-65, 55 (¶ 14) (Appendix, Tab 4). The Master Lease Agreement is a "net lease" requiring Belize to make payments unconditionally and without any right to abatement or reduction for any reason. Doc 31-2 – Pg 18 (¶ 6).

Intelco had no obligation under the Master Lease Agreement to provide services of any kind; rather, the government was responsible for transporting, installing, operating, and maintaining the equipment in Belize. Doc 31-2 – Pgs 17 (¶ 2), 23-24 (¶ 14), 66; Doc 33 – ¶ 9. Consequently, the government took possession of the phone equipment in Florida, and Intelco had no further duty under the leases. Doc 32 – ¶ 12; Doc 31-2 – Pg 66.

The Master Lease Agreement contains extensive provisions waiving Belize's sovereign immunity and consenting to suit in the United States. Belize "acknowledge[d] that the activities contemplated by [the Master

Lease Agreement] are commercial in nature rather than governmental or public." Doc 31-2 – Pg 30 (¶ 25(a)). It agreed "that it is not entitled to any right of immunity or defense on the grounds of sovereignty or otherwise with respect to" a lawsuit relating to the lease, and "expressly and irrevocably waive[d] any such right of immunity or defense." *Id.* It similarly waived application of the Act of State Doctrine, *see id*., and also agreed:

> that its rights and obligations under this Master Lease or any Lease Schedule shall be determined exclusively in accordance with the governing laws of the State of Florida, irrespective of conflict of law principles. Lessee irrevocably submits to the exclusive jurisdiction of any of the federal and state courts in the State of Florida in any action or proceeding arising out of or relating to the Master Lease or any Lease Schedule, and Lessee hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in any court of competent jurisdiction in the State of Florida.

Doc 31-2 – Pg 31 (¶ 25(b)). Belize further surrendered any objection to venue or claim of inconvenient forum and agreed that Miami is a proper venue. Doc 31-2 – Pg 32 (¶ 25(d)). These waiver and forum selection provisions were "key" from Intelco's perspective. Doc. 32 – ¶ 6.

The lease obligated the government to return the equipment by the end of 2007 or continue paying rent at the same rate, month-to-month, for an additional year. Doc 31-2 – Pg 25 (¶ 15). After this extra year, Belize had to return the equipment and continue paying rent until the return was fully

accomplished. *Id.* Because the bank's right to quarterly rent payments and its security interest terminated once it received the $6,748.189.20 due by the end of 2007, Intelco was entitled to all residual rights under the lease, including the extra rent payments after 2007. Doc 31-2 – Pgs 10 (§ 6.1), 11-12 (§ 7.11), 56 (§ 18).

In 2003, Intelco and Belize entered into a second equipment lease similar to the first. They agreed to a second schedule providing for quarterly payments from November 2003 to August 2008, again totaling $6,748.189.20, under the terms of the same Master Lease Agreement. Doc 31-3 – Pgs 35-48 (Appendix, Tab 5). As before, Intelco sold the right to these payments to the International Bank of Miami for $5 million. Doc 31-3 – Pg 49 (¶¶ 1-2). Thus, overall, Belize leased approximately $13.5 million worth of equipment from Intelco under the Master Lease Agreement.

B. Belize's Breach of the Leases

After taking possession of the phone equipment in Florida and installing it in government offices, Belize made the required rent payments of approximately $13.5 million to the International Bank of Miami. Doc 32 – ¶¶ 30-33. It made the last of these in August 2008, in compliance with the second lease schedule. *Id.*, Doc 31-3 – Pg 48.

In 2008, Belize held elections and a new administration was voted into office. Doc 32 – ¶ 32. The new government did not return the equipment or notify Intelco of its intent to keep it for an extra year, as required by the Master Lease Agreement. Doc 32 – ¶ 34. This triggered Belize's obligation to pay Intelco for its continued monthly use of the equipment for that year. Doc 31-2 – Pg 25 (¶ 15). After the year expired, the government again failed to return the equipment as mandated, further obligating it to pay monthly rent. Doc 32 – ¶¶ 34-37; Doc 31-2 – Pg 25 (¶ 15). The government continues to use the leased equipment. Doc 32 – ¶¶ 40-43. Indeed, a photo of Belize's Prime Minister addressing the country on New Year's Day, 2012 reveals an Intelco phone in his office. *Id*.; Doc 31-21. Yet Belize has not made a single required rent payment since 2008. Doc 32 – ¶ 34. At this point, it owes approximately $14 million in unpaid rent, with the amount increasing every month.[1]

Godfrey formed GDG as a Florida limited liability company in 2012. Doc 32 – ¶ 44. GDG maintains a bank account and registered address in Tallahassee and its principal office in Houston. *Id*. Intelco then assigned its

[1] As of February 2012, when this action was filed, Belize owed $5,623,491 in unpaid rent under the 2002 lease, and $4,723,732.44 under the 2003 lease. Doc 1 – Pgs 9-10. From February 2012 to date, it owes approximately $3,600,000 more. *Id*. ($112,469.82 owed monthly under both leases).

interests and assets to GDG, including its interests in the agreements with Belize. Doc 32 – ¶ 47. The Master Lease Agreement expressly permits Intelco to assign its rights under the contract. Doc 31-2 – Pgs 22-23 (¶ 11).

II. Course of Proceedings in the District Court

GDG sued Belize for breach in 2012. Doc 1 (Appendix, Tab 2). Belize moved to dismiss the complaint, arguing principally that it retained sovereign immunity against GDG's claims. Doc 20. It also argued secondarily that forum non conveniens and international comity required dismissal. *Id*. The basis for Belize's claim of immunity was its assertion that its Finance Minister, Fonseca, lacked authorization to enter into the leases with Intelco and to waive sovereign immunity. *Id*. at Pg 6-11. Whether Fonseca was properly authorized thus became the chief ground of contention in the battle over Belize's motion.

In opposing the motion, GDG marshaled evidence pointing plainly to Fonseca's authorization. Most obviously, the government made $13.5 million in rent payments to the International Bank of Miami from 2002 to 2008. Doc 32 – ¶¶ 30-33. Although the government claims it dealt with Intelco under a supposed "informal arrangement" only, Doc 20 – Pg 10; Doc 22-1 – ¶ 6, the official warrants issued by Belizean Financial Secretaries

authorizing the rent payments specifically state that payment is "[i]n accordance with" the lease agreements. Doc 31-9.

GDG also provided declarations from Godfrey, three members of the Belizean cabinet at the time, and the former Governor of Belize's Central Bank, all testifying that the cabinet specifically approved the lease agreements and that Fonseca was legally authorized by his ministerial portfolios and the national constitution to enter into the agreements on behalf of the government and to waive immunity. Docs 32-36, 42-1, 42-2. And GDG submitted as evidence legal opinions authored by Belize's counsel in 2002 and 2003, before the leases were signed, assuring the parties that the transactions were authorized by Belizean law, that Fonseca possessed all necessary authority, and that the immunity waiver and forum selection clauses specifically were legal and approved. Doc 31-2 – Pgs 2-6; Doc 31-3 – Pgs 67-69.

In support of its motion, Belize filed declarations from a legal advisor to the Finance Ministry and the current Financial and Cabinet Secretaries contradicting the position it expressed to the parties when the contract was signed. Docs 21-1, 22-1, 39-1, 39-2, 39-3. These current officials maintain that Fonseca lacked the necessary authority to enter into the leases and waive immunity under Belize's constitution and his portfolios. Belize

devoted fewer than two pages to forum non conveniens and comity arguments. Doc. 20 – Pgs 18-20.

The district court decided to avoid the dispute over Fonseca's authorization and the validity of the lease documents. Instead, it granted the motion on forum non conveniens and comity grounds. Doc 51 (Appendix, Tab 3). The court analyzed the traditional forum non conveniens factors and found that Belize was an adequate forum, that witness convenience and compulsory process supported litigating there, that Belize "would like to see this dispute litigated in its own nation," and that administrative burdens and choice of law questions complicated handling the case here. Doc 51 – Pgs 4-7. Alternatively, it held that international comity requires abstaining from adjudicating the case in the United States because the court would have to interpret Belizean law in order to determine whether Fonseca was authorized to sign the leases, and because the case purportedly "involves telecommunications services" in Belize. *Id*. at 10.

III. Standards of Review

The district court did not enforce or even consider the forum selection clause in the Master Lease Agreement, dismissing instead under forum non conveniens. *Id*. at 4-8. This failure to apply the forum selection clause is reviewed de novo. *See Slater v. Energy Serv. Grp. Int'l*, 634 F.3d 1326,

1331 (11th Cir. 2011). The district court's decision to dismiss based on international comity is reviewed for abuse of discretion. *See Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1303 (11th Cir. 2008). "A district court abuses its discretion when the court fails to apply the proper legal standard or to follow proper procedures in making its determination." *Id*.

SUMMARY OF ARGUMENT

The district court erred in dismissing this case based on forum non conveniens. The Master Lease Agreement contains an exclusive forum selection clause, and though Belize disputes the lease's validity, the district court was obligated to determine whether the contract, including its forum selection clause, is binding. If it is, the parties' agreement on forum displaces the standard forum non conveniens analysis and precludes dismissal on that ground. The court therefore had no choice but to determine the validity of the forum selection clause and, if it governs, enforce it unless Belize can overcome the strong presumption of enforceability that attaches to such agreements. This Court should remand for the district court to undertake that analysis. *See* Point I, *infra*.

The district court also abused its discretion in dismissing based on international comity. Federal courts are bound to exercise their jurisdiction in all but the most exceptional cases. Applying international comity in the

absence of parallel proceedings abroad, as the district court did here, is especially rare. This case is not an appropriate candidate for abstention based on comity. United States courts have a strong interest in upholding its citizens' contracts. By contrast, Belize's national interests in this case are limited. The case will not mire the district court in the application of Belizean law, as the court feared. Nor will it affect telephone service in Belize because the leases do not require Intelco or GDG to provide phone service. The only question is whether Belize will pay for the equipment it leased and has used for years. The Court should therefore reverse and hold that international comity is inapplicable. At a minimum, it should remand for the district court to consider the effect of the forum selection clause on the comity question. Because an exclusive forum selection clause providing for litigation in the United States represents a waiver of any interests a foreign party might have had in litigating elsewhere, courts generally decline to apply comity where such clauses govern. *See* Point II, *infra*.

ARGUMENT

I. Dismissal Based on Forum Non Conveniens Was Erroneous Because The District Court Was Obligated to Determine Whether the Contract Was Valid, and if So, Enforce the Parties' Agreement on the Forum

The Master Lease Agreement contains a clause requiring the Government of Belize to litigate this case in federal court in Florida. Doc

31-2 – Pg 31 (¶¶ 25(b), 25(d)). The district court was not free to bypass the question whether this clause is binding and enforceable because, if it is, the court could not dismiss the case due to forum non conveniens. This case must therefore be remanded for determination whether the exclusive forum selection clause is valid.

A. There is a Strong Presumption Favoring Enforcement of Forum Selection Clauses

Decisions of the Supreme Court and this Court strongly favor enforcement of forum selection clauses, particularly in cases involving international commercial transactions. What this Court has called "the foundational authority" in this area is *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 92 S. Ct. 1907 (1972). *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1240 (11th Cir. 2012). In *The Bremen*, an American corporation and a German company entered into a contract with a provision mandating that disputes must be "treated before the London Court of Justice." 407 U.S. at 2, 92 S. Ct. at 1909. The district court declined to enforce the provision, analyzed the German company's "motion to dismiss under normal forum non conveniens doctrine applicable in the absence of such a clause," and retained the suit in the United States. 407 U.S. at 6, 92 S. Ct. at 1911. The Fifth Circuit affirmed. *See* 407 U.S. at 7-8, 92 S. Ct. at 1912.

The Supreme Court reversed and upheld the forum selection clause. "For at least two decades," the Court observed, "we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so." 407 U.S. at 8, 92 S. Ct. at 1912. Accordingly, the Court recognized the need to enforce commercial parties' agreements regulating where to resolve their disputes:

> The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

407 U.S. at 13-14, 92 S. Ct. at 1915. "The correct approach," the Court concluded, "would have been to enforce the forum clause specifically unless [the American corporation] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 407 U.S. at 15, 92 S. Ct. at 1916.

Following *The Bremen*, the Supreme Court has repeatedly confirmed the central importance of enforcing forum selection clauses. In *Scherk v. Alberto-Culver Co.*, a contract between an American company and a German citizen provided for arbitration in Paris. 417 U.S. 506, 508, 94 S.

Ct. 2449, 2452 (1974). Reversing the lower courts, the Supreme Court upheld the forum selection and arbitration clause against arguments that it was rendered unenforceable by U.S. securities laws. *See* 417 U.S. at 517-20, 94 S. Ct. at 2455-58. The provisions were an "almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." 417 U.S. at 516, 94 S. Ct. at 2455; *see also Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-539, 115 S. Ct. 2322, 2328-29 (1995) (upholding foreign arbitration clause from challenge based on Carriage of Goods By Sea Act); *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-95, 111 S. Ct. 1522, 1527-28 (1991) (upholding non-negotiated forum selection clause printed on ticket); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 3356 (1985) (upholding foreign arbitration clause from challenge based on antitrust laws).

This Court has also held that "*The Bremen* confirmed a substantial change in the approach of United States courts… [and] recognized the reality that privately bargained-for forum-selection clauses were a necessary component of the expanded international commercial relationships of our time." *Estate of Myhra, Ltd.*, 695 F.3d at 1240. Forum selection clauses are particularly valuable to "truly international" transactions involving parties

from different countries. *Liles v. Ginn-La West End Ltd.*, 631 F.3d 1242, 1246 (11th Cir. 2011). In this case, the transaction is "truly international" because, though Intelco is Belizean, its assignee GDG is a Florida corporation. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 478, 123 S. Ct. 1655, 1662 (2003) (corporate citizenship generally assessed when complaint filed). Moreover, the International Bank of Miami, an American citizen, was an essential party to the transactions, which were also negotiated and performed in the United States. *See Liles*, 631 F.3d at 1246. Had Belize defaulted on its payment obligation during the initial terms of the leases, the bank could have pursued enforcement of the contract against Belize, as GDG is doing now. Regardless, forum selection clauses receive the same treatment in cases involving domestic parties. *See, e.g.*, *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231, 1236 (11th Cir. 2011); *Slater*, 634 F.3d at 1331.

An exclusive forum selection clause is therefore "presumptively valid and enforceable unless the plaintiff makes a strong showing that enforcement would be unfair or unreasonable under the circumstances." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009) (quotation omitted). It will be upheld unless "(1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in

court because of inconvenience or unfairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy." *Id.*; *accord Slater*, 634 F.3d at 1331; *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093, 119 S. Ct. 851 (1999). The party opposing enforcement bears the burden of establishing invalidity. *See Estate of Myhra*, 695 F.3d at 1240. And when, as here, the parties contest enforcement and "submit conflicting affidavits, the court, in the absence of an evidentiary hearing, [should be] inclined to give greater weight to the plaintiff's version of the jurisdictional facts and to construe such facts in the light most favorable to the plaintiff." *Id.* at 1239.

B. The District Court Must Determine Whether the Forum Selection Clause Is Valid and, if so, Enforce It

In light of the specific rules governing exclusive forum selection clauses, the district court erred in completely ignoring the existence of such a provision in the Master Lease Agreement and proceeding as if the case is subject to ordinary forum non conveniens dismissal. Instead, the court was obligated to determine whether the clause governs the parties' dispute, which entailed determining whether Fonseca was authorized to bind the government to the lease agreements. Had the court found that the forum selection clause controls, it would have been required to enforce it and

adjudicate GDG's claims unless Belize could overcome the strong presumption of enforceability. Since the court failed to perform this task, the case must be remanded.

The district court should have undertaken this analysis – and must do so following remand – because forum non conveniens does not apply when a forum selection clause governs. In *The Bremen*, the Supreme Court reversed precisely because the lower courts applied forum non conveniens instead of the forum selection clause analysis. *See* 407 U.S. at 6, 13-15, 92 S. Ct. 1911, 1914-15. This Court has likewise observed that, when evaluating forum selection clauses, the "analysis is confined to application of the *Bremen* test." *Liles*, 631 F.3d at 1255 n. 19. As the Seventh Circuit explained, "a forum selection clause is a substitute for the doctrine [of forum non conveniens], not another name for it, and so the test of reasonableness must be different from a test of convenience." *Abbott Labs v. Takeda Pharm. Co. Ltd.*, 476 F.3d 421, 426 (7th Cir. 2007); *accord EnerWaste Intern. Corp. v. Energo SRL*, 2011 WL 862951 at * 1 (9th Cir. 2011) ("The forum selection clause being enforceable, the forum non conveniens doctrine does not apply"); *Mitsui & Co. v. Mira M/V*, 111 F.3d 33, 37 (5th Cir. 1997) (same).

As a result, forum non conveniens factors like the convenience of parties and witnesses and the expense of litigating in a distant locale will not override a forum selection clause. *See Rucker*, 632 F.3d at 1237 (inconvenience of Alabama residents litigating in Illinois no basis to invalidate clause); *Liles*, 631 F.3d at 1255 (Bahamas forum selection clause valid though case may be "more difficult, and less appealing"); *P&S Bus. Mach. v. Canon USA, Inc*., 331 F.3d 804, 807-08 (11th Cir. 2003) ("The financial difficulty that a party might have in litigating in the selected forum" insufficient to negate clause). Rather, "a plaintiff must show that litigating 'in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be *deprived of his day in court.*'" *Rucker*, 632 F.3d at 1237 (emphasis in original) (quoting *The Bremen*, 407 U.S. at 17-18).

Additionally, forum non conveniens will not apply if the leases are found to be valid because Belize specifically waived any objection to venue or claim of inconvenience. Doc 31-2 – Pg 32 (¶ 25(d)). Even if this waiver did not exist, agreement to a mandatory Florida forum would suffice, since any inconvenience caused by having to litigate there would have been apparent when Belize entered into the leases. *See Rucker*, 632 F.3d at 1237

("Moreover, any inconvenience the plaintiffs would suffer by being forced to litigate in Illinois was foreseeable at the time of contracting").

Nor can Belize argue that this Court should find the presumption of enforceability overcome on the present record, that is, assuming the forum selection clause is binding. There is no evidence Intelco committed fraud or overreaching, and any such conduct would have to have wrongfully induced the government to agree to the forum selection clause itself, not just the overall lease transactions. *See Lipcon*, 148 F.3d at 1296. Belize would also be hard pressed to complain of some inherent unfairness in the procedures used in federal court, or the remedies available to it there.

Finally, Belize has not shown that any public policy would be harmed by enforcement of the forum selection clause. On the contrary, the Supreme Court and this Court have been emphatic that enforcement of forum selection clauses plays a vital role in serving the public interest in fostering international commerce. *See* Point I(A), *supra*. This was most recently stressed by the United States Chamber of Commerce in a case involving forum selection clauses now pending in the Supreme Court:

> Forum selection clauses are widely used in contracts of all types, by businesses large and small…
>
> If businesses, particularly small businesses, cannot control and limit their litigation costs through forum selection clauses, they likely will become reluctant to pursue particular

> transactions or business strategies, such as expanding the geographic reach of their operations.[2]

This Court and others have therefore rejected challenges to forum selection clauses on policy grounds, in part based on the important business interests advanced by enforcement. *See, e.g., Estate of Myhra*, 695 F.3d at 1244; *Liles*, 631 F.3d at 1250-52; *see also Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir.) (en banc) (same), *cert. denied*, 525 U.S. 943, 119 S. Ct. 365 (1998); *Haynsworth v. The Corporation*, 121 F.3d 956, 969 (5th Cir. 1997) (same), *cert. denied*, 523 U.S. 1072, 118 S. Ct. 1513 (1998).

In addition, enforcement would serve the basic value of upholding the integrity of contracts. What Belize ultimately seeks is to renege on its commitment to resolve any disputes arising from the leases in the United States, which was a "key" element of the deal from Intelco's standpoint. The same was likely true for the International Bank of Miami, which financed the transaction and retained rights to sue Belize in Florida in case of a default. Foreign sovereigns may not withdraw waivers of immunity except in accordance with the terms of the original waiver. *See* 28 U.S.C. § 1605(a)(1) (Statutory Addendum). Yet Belize aims to achieve withdrawal

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[2] Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner, *Atlantic Marine Constr. Co., Inc. v. J-Crew Mgmt., Inc.*, No. 12-929 at 11, 15 (Feb. 25, 2013), *available at* http://sblog.s3.amazonws.com/wpcontent/uploads/2013/Atlantic_Marine_CofC_Amics. pdf.

by questioning the authority of its own Finance Minister. The Master Lease Agreement also provides that Belize's consent to jurisdiction in Florida is "irrevocabl[e]." Doc 31-2 – Pg 31 (¶ 25(b)). If Fonseca was authorized, the waiver and forum selection provisions should be treated as the products of informed negotiation and choice between sophisticated parties. *See, e.g., The Bremen*, 407 U.S. at 13-14 ("unrealistic to think" parties did not negotiate with "consequences of the forum clause" in mind); *Abbot Labs*., 476 F.3d at 426 (party "could and no doubt did consider the potential inconvenience of litigating in Japan, but decided to risk it. It is bound by its choice"). Their bargain should not be upset now, over a decade later:

> [O]ne who has agreed to be sued in the forum selected by the plaintiff has thereby agreed not to seek to retract his agreement by asking for a change of venue on the basis of costs or inconvenience to himself; such an effort would violate the duty of good faith that modern law reads into contractual undertakings.

N.W. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990).

If the forum selection clause is valid and enforceable, the case cannot be dismissed due to forum non conveniens. The Court should therefore reverse and remand for the district court to make the necessary findings on Fonseca's authorization and contractual validity. *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295,

1306 (11th Cir. 2006) (district court should make factual findings in first instance).

II. The District Court Erred in Dismissing Based on International Comity

The District Court also dismissed based on international comity. Doc 51 – Pgs 8-10. The court abused its discretion, however, by misapplying the law governing that doctrine. The circumstances requiring abstention do not exist here. At the least, the Court should remand for the district court to consider the effect of the forum selection clause on the abstention analysis.

A. Abstention Based on Comity is the Rare Exception

International comity "is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004). This Court distinguishes between applying comity retrospectively and prospectively. *See id.* at 1238. Applying the doctrine retrospectively entails deferring to the judgment of a foreign tribunal or abstaining to permit the conclusion of parallel proceedings abroad. *See id*. Comity may also be applied prospectively, in the absence of parallel proceedings, which requires "consider[ing] whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id.* This case

involves the prospective application of comity, since there is no parallel proceeding between the parties over the leases in Belize.

However categorized, abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976) (quotation omitted). It is well-established that "[f]ederal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Turner Entm't v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (quoting *Colorado River*, 424 U.S. at 817, 96 S. Ct. at 1246). "In weighing the considerations for and against abstention, a court's heavy obligation to exercise jurisdiction exists regardless of what factors are present on the other side of the balance." *Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006). Even a parallel proceeding in a foreign jurisdiction – and none exists here – is not itself sufficient to justify abstention:

> The exceptional circumstances that would support such a surrender must, of course, raise considerations which are not generally present as a result of parallel litigation, otherwise the routine would be considered exceptional, and a district court's unflagging obligation to exercise its jurisdiction would become merely a polite request.

Id.; see also Finova Capital Corp. v. Ryan Helicopters U.S.A. Inc., 180 F.3d

896, 898 (7th Cir. 1999) (noting "exceptional nature" of abstention).

Two other factors counsel against applying comity in this case. First, if deferring to parallel proceedings in a foreign country is exceptional, applying comity prospectively is rarer still. In *Hartford Fire Ins. Co. v. Merrett Underwriting Agency Mgmt, Ltd*., the Supreme Court appeared to disapprove of abstaining due to international comity unless a clear conflict between American and foreign law precludes compliance with both. *See* 509 U.S. 764, 798-99, 113 S. Ct. 2891, 2910-11 (1993). Following *Hartford Fire*, many courts require such a conflict before abstaining. *See, e.g., Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006); *United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd*., 210 F.3d 1207, 1223 (10th Cir. 2000), *aff'd*, 532 U.S. 588, 121 S. Ct. 1776 (2001); *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998). "Absent true conflicts, a judgment from a foreign court, or parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds." *Gross*, 456 F.3d at 393; *accord In re Gucci*, 309 B.R. 679, 684 (Bankr. S.D.N.Y. 2004) ("abstention normally is denied even where there are parallel proceedings pending… [a]nd this case is a far weaker one for abstention, as there is no parallel proceeding").

This Court charted a different course in *Ungaro-Benages*, permitting

abstention prospectively without a parallel case in a foreign country or a direct conflict between American and foreign law. It is an approach that has prompted judicial and scholarly debate. *See, e.g., Gross* 456 F.3d at 393 (discussing *Ungaro-Benages*); Donald Earl Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 43-49 (Nov. 2010) (describing courts' differing approaches following *Hartford Fire*). But whatever the merits of prospective comity in the abstract, *Ungaro-Benages* at least involved extraordinary facts: a foundation created by the United States and German governments to handle thousands of Holocaust-related claims. *See* 379 F.3d at 1239-40; *see also, e.g., Bi v. Union Carbide Chem. and Plastics Co*., 984 F.2d 582, 585-86 (2d Cir.) (deferring to Indian claims process for victims of Bhopal disaster), *cert. denied*, 510 U.S. 862, 114 S. Ct. 179 (1993). This is a discrete and ordinary commercial case between two parties only, without special characteristics or U.S. government involvement. Applying comity prospectively to a garden-variety contract dispute would significantly expand the doctrine's reach.

Second, the Court should also be wary of extending international comity prospectively to a foreign government. Unlike a foreign company, a foreign government already has broad protection from suit in the United States based on comity. Congress enacted the Foreign Sovereign

Immunities Act as "a matter of grace and comity on the part of the United States" toward foreign governments. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 1967 (1983); *see also Dole*, 538 U.S. at 479, 123 S. Ct. at 1663. The statute controls "whether and under what circumstances foreign nations should be amenable to suit in the United States," and is "a comprehensive scheme" regulating the subject. *Id*. at 493, 496-97; *accord Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1531 (11th Cir.), *cert. denied*, 474 U.S. 995, 106 S. Ct. 408 (1985). Thus, in its weighing of the relevant diplomatic interests and its resulting statutory extension of comity to foreign states, Congress has long provided that a government's express waiver of immunity is enough to permit it to be sued here. *See* 28 U.S.C. § 1605(a)(1).

Applying the judge-made doctrine of international comity in a case involving a foreign sovereign would constitute a sort of "double comity" beyond that already extended by Congress. It would flout Congress' goal to fashion a uniform, predictable, and comprehensive regime dictating when a foreign government is free from suit in the United States, and when it is not. "These objectives would be undercut were courts to read requirements into the statute that Congress itself has not clearly prescribed." *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1035, 1036-37 (9th Cir. 2010) (en banc)

(rejecting mandatory exhaustion of remedies in foreign countries as prerequisite to suit under FSIA), *cert. denied*, 131 S. Ct. 3057 (2011). International comity fashioned by courts "has no application where Congress has indicated otherwise." *In re Maxwell Commc'n. Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996). There may be extreme cases where international relations demand discretionary judicial abstention even where Congress has decided to permit suit under the FSIA, but an ordinary commercial dispute with no parallel foreign proceedings or conflict between American and foreign laws seems like an unlikely candidate.

Together, the virtually unflagging duty to exercise federal jurisdiction, the exceptional nature of abstaining in favor of foreign interests, the even rarer application of comity prospectively, and the goals of the FSIA all militate against dismissing this case.

B. Abstention is not Required Under the *Ungaro-Benages* Test

Ungaro-Benages prescribes a weighing of foreign and domestic interests: "Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." 379 U.S. at 1238. In this case, American interests clearly predominate over those of Belize, making a prospective application

of comity inappropriate. This is true even without an adjudication of the validity of the leases and the forum selection clause, which tilts the balance away from abstention even further. *See* Point II(C), *infra*.

Protecting an American citizen's right to redress for breach of contract is a vital and long-recognized interest of American courts. *See, e.g.*, *Belknap, Inc. v. Hale,* 463 U.S. 491, 510-12, 103 S. Ct. 3172, 3183-84 (1983) (state has substantial interest in protecting citizens from misrepresentation and breach of contract); *Diamond Crystal Brands, Inc. v. Food Movers Intern., Inc*., 593 F.3d 1249, 1274 (11th Cir. 2009) (In breach of contract action, "Georgia has a 'manifest interest in providing effective means of redress for its residents'" (quoting *McGee v. Int'l Life Ins. Co*., 355 U.S. 220, 223, 78 S. Ct. 199, 201 (1957)), *cert. denied*, 131 S. Ct. 158 (2010). Hence, the Second Circuit declined to abstain based on international comity when an American bank brought claims for repayment against Peru. *See Pravin Bankers Assoc. v. Banco Popular Del Peru*, 109 F.3d 850, 854-55 (2d Cir. 1997). Peru argued that the claims should await the outcome of negotiations to restructure its foreign debt, but the court disagreed: "[T]he United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders." *Id*. at 855.

GDG is an American company, and another American corporation, The International Bank of Miami, was heavily involved in the transaction from the beginning, took assignment of the contractual right to receive rent payments under the leases for several years, and had the right to enforce the leases had Belize stopped paying while the bank was still owed money. The transaction was negotiated in Florida and Washington D.C. and then performed here when Intelco delivered the phone equipment to Belizean government representatives in Miami. The United States naturally has a strong interest in protecting the integrity of these dealings on American soil involving American companies. The district court acknowledged as much, though it gave this interest insufficient weight. Doc 51 – Pg 10.

By contrast, the district court identified two Belizean interests outweighing those of the United States. First, it held that it would be required to interpret Belizean law, "[a]nd the Belizean court system likely has a strong interest seeing that its national laws are properly interpreted." *Id*. Whatever need might arise to examine Belizean law comes into play only because Belize now alleges that its law did not authorize Fonseca to enter into the leases. The contract itself is construed according to Florida law. Doc 31-2 – Pg 16 (¶ 25(b)). But if an untested allegation of non-authorization under foreign law is enough to obtain dismissal of cases in

American courts against foreign sovereigns, nothing would prevent them from making the allegation routinely. When a foreign party takes affirmative steps to limit jurisdiction or avoid justice in the United States – as Belize attempts here with its made-for-litigation claim of non-authorization – deferring to interests of comity is unwarranted. *See S.E.C. v. Banner Fund, Int'l*, 211 F.3d 602, 612-13 (D.C. Cir. 2000). Ratifying the district court's conclusion would pose a threat to any American business that has commercial dealings with foreign governments.

As important, the need to examine Belizean law in this case is minimal. Much of the proof involved in deciding whether Fonseca was authorized does not entail examining Belizean law, such as the fact of $13.5 million in payments under the leases over several years and the declarations by government ministers who were present that Belize's cabinet approved the leases. In any event, it "warrants repeating that federal judges are quite capable of applying foreign law." *Applied Med. Distrib. Corp. v. The Surgical Co., BV*, 587 F.3d 909, 920 (9th Cir. 2009); *accord United Int'l Holdings*, 210 F.3d at 1223 ("state and federal courts routinely apply the law of other states, even of other countries"). Nor will any interpretation of Belize's "national laws" by the district court – if it is even required to perform the task – reverberate in Belize beyond this one lawsuit. Doc 51 –

Pg 10. Obviously, an American court's reading of Belizean law will not operate as precedent in Belize or have any unwanted effect on its courts or national laws.

The second interest of Belize identified by the district court is that this case "involves telecommunications services" in Belize. *Id*. This is simply incorrect and constitutes another error by the district court in interpreting the terms of the Master Lease Agreement. Under that contract, Belize assumed sole responsibility for taking possession of, transporting, installing, operating, and maintaining the phone equipment in Belize. Doc 31-2 – Pgs 17 (¶ 2), 23-24 (¶ 14), 66; Doc 33 – ¶ 9. The Master Lease Agreement does not compel Intelco to provide services. Intelco merely leased equipment to the government, and now its assignee seeks long overdue payment.[3] Ironically, Belize has never claimed the case will affect phone service there – which is why there is no record evidence supporting the notion. The national interest it cited when urging abstention was that "Belize has a significant interest in this action, as this action involved the issue of the

[3] GDG's complaint did seek return of the leased equipment as an alternative remedy to damages for its residual value, *see* Doc 1 – Pg 10 (¶ iii), but if the district court found that this relief could affect intra-governmental phone service in Belize (and GDG does not believe it would), this injunctive claim is the only one in the action the court should abstain from hearing – as distinct from GDG's damages claims based on unpaid rent and the equipment's residual value.

Constitutional power of its Ministers," not that phone service will be compromised. Doc 20 – Pg 20.

Moreover, it is hard to see how any case brought against a foreign buyer or lessee by an American seller or lessor of durable goods seeking payment could be maintained in United States courts if the district court's view of this case is accepted. Whether such American goods are destined for a foreign government or a company serving foreign consumers, they will always presumably have some impact on people and commerce abroad. If merely seeking payment for the goods raises comity concerns because it would somehow interfere with foreign economies or services, a large proportion of the contract cases in United States courts between American suppliers and their foreign counterparties would have to be dismissed. Abstention would become the rule in such cases, not the rare exception.

The district court relied heavily on *Belize Telecom* as a basis for abstaining, *see* Doc 51 – Pgs 9-10, but the two cases have little in common. Most obviously, the district court decision in that case contradicted a ruling from a Belizean court. *See* 528 F.3d at 1302-03. *Belize Telecom* therefore applied international comity retrospectively, while the court below acted prospectively. As discussed above, this is a more tenuous basis for abstention. *See* pp. 27-28, *supra*. *Belize Telecom* also noted that "[n]one of

the parties to the litigation is an American corporation." *Id.* at 1307. In this case, the plaintiff is American, as was the heavily involved bank in Miami. In *Belize Telecom*, the Court was concerned that "the litigation might have [an] effect on the delivery of telecommunications services." *Id*. As discussed above, this case does not raise that concern. Finally, this case features an exclusive forum selection clause mandating litigation in the United States, whereas the forum selection clause in *Belize Telecom* was non-exclusive. *See id*. at 1303 n. 4. If the clause is found to be valid, this weakens the case for abstention even further. *See* Part II(C), *infra.*

Ultimately, international comity "serves as a guide to federal courts where the issues to be resolved are entangled in international relations." *Ungaro-Benages*, 379 F.3d at 1237 (quotation omitted). This case is not bound up in international relations. It is nothing more than a breach of contract action against a party that, if GDG's allegations are true, agreed to pay for goods and then changed its mind and decided not to. *See Cassirer*, 616 F.3d at 1031 n. 16 ("this case involves a private dispute of the sort that Congress had in mind when enacting the FSIA"). The Master Lease Agreement acknowledges as much: "the activities contemplated by [the lease] are commercial in nature rather than governmental or public." Doc

31-2 – Pg 30 (¶ 25(a)). The case does not demand that American courts extend some *ad hoc* gesture of diplomatic grace toward Belize.

C. At the Least, the Court Should Remand the Comity Question for Decision in Light of the Resolution of the Validity of the Forum Selection Clause

GDG believes the international comity question is easily resolved in its favor now, without having to wait for the district court's decision on whether the forum selection clause is enforceable. But if the Court disagrees, it should at least remand the comity issue for resolution along with the forum selection clause question. If the clause is found to be enforceable, the case for abstaining is even weaker.

This Court has acknowledged the importance of forum selection clauses to the comity analysis, at least implicitly. In *Belize Telecom*, the Court noted that the parties' "forum selection clause… was non-exclusive; thus, it did not preclude venue in Belize." 528 F.3d at 1303 n. 4. Here, the clause is exclusive and does preclude venue in Belize. Doc 31-2 – Pg 31 (¶ 25(b)). The *Belize Telecom* Court also analyzed the convenience of litigating in the United States and Belize. *See* 528 F.3d at 1308. But if the forum selection clause is valid, Belize has waived any objection based on inconvenience. Doc 31-2 – Pg 32 (¶ 25(d)). In *Turner,* the Court acknowledged that, "[g]iven exclusive jurisdiction over the matter, the

federal forum would without doubt be capable of rendering a just result." 25 F.3d at 1521. Here, if Fonseca was authorized, Florida courts *were* given exclusive jurisdiction over the matter. In *Ungaro-Benages*, the Court held that its "determination of the adequacy of the alternative forum is informed by *forum non conveniens* analysis." 379 F.3d at 1238. That analysis will be displaced in this case by the more stringent doctrine governing forum selection agreements if the clause is binding. These cases may well have been decided differently had the parties consented to an exclusively American forum.

Other courts have specifically rejected abstention based on international comity where the parties agreed on a specific forum in advance. In *E&J Gallo Winery v. Andina Licores S.A.*, the contract mandated litigation in California, but Andina sued in Ecuador. *See* 446 F.3d 984, 987 (9th Cir. 2006). Holding that the district court should have enjoined that case, the Ninth Circuit recognized that applying comity would render the forum selection agreement "a nullity." *Id*. at 992. "The potential implications for international commerce are considerable," since such clauses "enhance certainty, allow parties to choose the regulation of their contract, and enable transaction costs to be reflected accurately in the transaction price." *Id*. "No public international issue is raised in this case,"

the court found, as it dealt "with enforcing a contract and giving effect to substantive rights. This in no way breaches norms of comity." *Id*. at 994. The court also noted that, "[u]nder the reasoning of the district court, any party seeking to evade the enforcement of an otherwise-valid forum selection clause need only rush to another forum and file suit." *Id*. Under the reasoning of the district court here, such a party need only allege that its own agent lacked authorization to have signed the contract in the first place, and the allegation need not even be subjected to factual scrutiny.

The Ninth Circuit again declined to apply comity in *Applied Med. Distrib.*, where a Belgian company had previously agreed to a United States forum. *See* 587 F.3d at 919-21. As in *Gallo,* the Court relied on the fundamental importance of effectuating forum selection clauses: "If we do not give primacy to parties' choice of forum and choice of law, there will be insufficient certainty to foster international trade relations." *Id.* at 916. It also cited the lack of any "public international issue" at stake. *Id*. at 921. Similarly, the Fifth Circuit rejected the application of comity in the case of a Japanese company that consented to a Texas forum and the application of Texas law, largely on the basis of the choice of forum and choice of law provisions. *See Kaepa, Inc. v. Achilles Corp*., 76 F.3d 624, 627-28 (5th Cir.), *cert. denied*, 519 U.S. 821, 117 S. Ct. 77 (1996). And the Seventh Circuit

reversed a decision to abstain based on international comity because the district court failed to factor the existence of a forum selection clause into the comity analysis. *See AAR Int'l, Inc. v. Nimelias Enter. S.A.*, 250 F.3d 510, 523 (7th Cir. 2001), *cert. denied*, 534 U.S. 995, 122 S. Ct. 463 (2001).

Here too, a contractual provision binding Belize to litigate in this country would further tip the scales away from abstention. If Belize really had valid institutional or national interests in avoiding the judgment of a United States court, it would not have agreed to a Florida forum. And while the defendants in *Gallo*, *Applied Med. Distrib.*, *Kaepa*, and *AAR* were private companies, Belize has not identified a relevant "public international issue" here any more than the defendants did in those cases. As in those cases, this was a purely commercial transaction and is now a purely commercial dispute. Once the forum selection clause is found to be valid, Belize's comity argument becomes nothing more than an unabashed plea to renege on its contractual commitment to litigate in this country.

On the other side of the scale, the interest in handling this case in the United States only rises if the parties' agreement on forum governs. In that event, the American interest in ensuring its citizens' ability to obtain redress for breach of contract would be augmented by the further interest in promoting international commerce through the enforcement of valid forum

selection clauses. As *Gallo* and *Applied Med. Distrib.* recognized, this interest takes precedence over what the Fifth Circuit called the "vague and omnipotent notion of comity" postulated by courts. *Kaepa*, 76 F.3d at 627. Indeed, the strong presumption favoring enforcement of forum selection clauses first articulated in *The Bremen* was itself a product of the desire to show comity to foreign parties and move past the "parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen*, 407 U.S. at 9, 92 S. Ct. at 1912; *see also Lipcon*, 148 F.3d at 1294 ("furthering international comity" underlay *The Bremen* and *Scherk*). But the reverse is also true. When foreign parties agree to be bound by our laws and litigate in our courts, international comity demands that their commitment be enforced, so that certainty in international commerce is preserved and American parties to contracts with foreign actors are protected. *See, e.g.*, *Applied Med. Distrib.*, 587 F.3d at 921 (failure to enforce forum selection agreement through anti-suit injunction "would seriously *harm* international comity" (emphasis in original)).

This case is not a suitable candidate for the application of prospective comity. But at the least, the district court should have considered the effect of the forum selection clause on the analysis.

CONCLUSION

The Court should remand for a factual determination of whether Belize is bound by the forum selection clause. If it is, the district court should determine if Belize can overcome the strong presumption of the clause's applicability. The Court should also hold that the doctrine of abstention based on international comity does not apply in this case, or, at the least, that following remand the district court should reassess whether the doctrine governs in light of the existence of the forum selection clause.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2013, an original and six copies of the foregoing Plaintiffs-Appellants' Brief were sent via third-party commercial carrier, overnight service, to the Clerk of the Court, and one copy was sent via First Class U.S. mail to each of the following:

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 9,277 words.

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Dated: June 27, 2013

Statutory Addendum

28 U.S.C. § 1605(a). General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
>
> (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not

apply to –

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341