IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16–cv–02547–RM–KMT

GOLDGROUP RESOURCES, INC.,

Plaintiff,

v.

DYNARESOURCE DE MEXICO, S.A. DE C.V., and
DYNARESOURCE, INC.,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Kathleen M. Tafoya

In a classic case of too many cooks spoil the broth, the parties find themselves subject to diametrically opposed Orders issued in three cases in three different jurisdictions and in two different countries. In this, their eleventh case against each other filed during approximately the same number of years, the question is, "Which order prevails?" Applicant Goldgroup Resources, Inc. ("Goldgroup") says Chief Judge Krieger and Abitrator David B. Wilson's Orders are entitled to enforcement; DynaResource de Mexico, S.A. de C.V. ("DynaMexico") and DynaResource, Inc. ("DynaUSA") (collectively "DynaResource") says the Order of Mexico City Judge Julio Gabriel Iglesias Gomez of the Superior Court of Justice for the Federal District prevails.[1]

[1] Goldgroup appealed the Mexico City federal court's decision through a process known as an amparo proceeding. (Mot. Supp., ¶ 6.) While the instant motions were pending before this Court, the First District Court of the Eleventh Region Auxiliary Center by Alejandro Bermudez

This case involves Mexican gold, a Mexican goldmine, a Mexican company, and an agreement governed by Mexican law. Lest one conclude that the matter could not get more complicated, the final orders[2] in question were issued in both the Mexico City case and in the arbitration in the absence of participation by the opposing parties; in other words, both Arbitrator Wilson and Judge Gomez made their findings after hearings where only one side appeared on the merits.[3] Predictably, they both found in favor of the party appearing and against the absent party. Only Judge Krieger issued a ruling wherein all parties were able to fully and fairly participate, however the finality of her decision on the narrow issue of arbitrability is challenged.

As the cherry on top, Judge Gomez appears to have been completely in the dark about the case pending before Judge Krieger in the United States and her September 29, 2015 Order before he issued his ruling on October 5, 2015. Judge Krieger also appears to have been unaware of the case[4] pending in Mexico City before she issued her ruling, although she was made aware of it in

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Sanchez**,** First District Judge in Coatzacoalcos, Veracruz, entered its Order on the appeal in Indirect Amparo Action 945/2015, ("Amparo Order") upholding the Mexico City Order on August 24, 2017. [Doc. No. 42-1 and 42-2 (English Translation).] Unless otherwise noted, citations to this Order are made in accordance with the Court's docketing numbers appearing at the top right corner of each page.

[2] For reasons set forth *infra*, this court finds Judge Krieger's Order dated September 29, 2015, issued in Case No. 14-cv-01527-MSK-KMT is not a final order.

[3] As made clear from the Amparo Order, Goldgroup was fully aware of the existence of the Mexico City case but chose to challenge the service of process rather than argue the merits of the case.

[4] In its verified complaint in 14-cv-01527, DynaResource states in paragraph 2 that "Goldgroup's March 10, 2014 Demand for Arbitration . . . concerns the same matters now subject to judicial proceedings in Mexico." This paragraph refers to *In re* DynaMexico, Fate of the Facts, File No. 227/2012, Fourth Civil Court of Mazatlán,Sinaloa, referred to by the parties as "the Mazatlán case." (Compl. [Krieger Case Doc. No. 1], ¶ 35.) This is a different case from the case in which Judge Gomez has issued his final Order.

subsequent filings.[5] The parties, however, appear to have been fully aware of all the various court proceeding and were actively litigating each.

This case comes before this court on Goldgroup's "Application to Confirm Arbitration Award" ("GG App.") [Doc. No. 2] filed October 24. 2016. "DynaResource de Mexico, S.A. de C.V.'S and DynaResource, Inc.'s Answer and/or Response to Goldgroup Resources, Inc.'s Application to Confirm Arbitration Award" ("DynaMexico Answer") [Doc. No. 13] was filed November 17, 2016, which was quickly followed by "DynaResource de Mexico, S.A. de C.V.'s and DynaResource, Inc.'s Petition for Nonrecognition of Foreign Arbitral Award and/or Motion to Vacate Arbitration Award"("DynaMexico Pet.") [Doc. No. 21] filed November 21, 2016. "Goldgroup's Reply in Support of its Application to Confirm Arbitration Award" ("GG Reply") [Doc. No. 36] and "Goldgroup's Response to DynaResources' [sic] Motion to Vacate" ("GG Resp.")[Doc. No. 35] were both filed on December 23, 2016. "DynaResource de Mexico, S.A. de C.V.'s and DynaResource, Inc.'s Reply in Support of their Petition for Nonrecognition Of Foreign Arbitral Award and/or Motion to Vacate Arbitration Award (ECF No. 21)" ("DynaMexico Reply") [Doc. No. 37] was filed January 6, 2017.

Upon the entry of the Amparo Order by the Mexican court of appeals, DynaResource de Mexico, S.A. de C.V.'s and DynaResource, Inc. filed their "Motion for Leave to Supplement the Record" [Doc. No. 42], attaching the Amparo Order both in Spanish [Doc. No. 42-1] and with an English translation [Doc. No. 42-2]. "Goldgroup's Response to Respondents' Motion for Leave

[5] In Judge Krieger's case, a supplemental notice of related cases acknowledged the existence of the Mexico City case merely by case and caption. There was no advisement to Judge Krieger that in that case a foreign judge was considering and preparing to rule on the same issues involved in the Colorado federal case, including whether the arbitration clause of the Earn In/Option Agreement was valid and applicable to the current disputes between the parties.

to Supplement the Record" [Doc. No. 45] was filed on September 25, 2017, and DynaResource de Mexico, S.A. de C.V.'s and DynaResource, Inc.'s Reply [Doc. No. 46] was filed on October 2, 2017. This court allowed the supplementation of the record with the Amparo Order but did not allow any further briefing. [Doc No. 48.]

BACKGROUND AND STATEMENT OF RELEVANT FACTS

Any attempt to untangle this judicial web must first start with a relevant history and timeline of relevant events.

On September 1, 2006, DynaMexico, DynaUSA, and Goldgroup entered into an Earn In/Option Agreement ("Option Agreement") relating to the property and gold mining operations in San José de Gracia, Sinaloa, Mexico. [Doc. No. 21-3.] As they are wont to do when vast amounts of money are involved, relations between the parties became less than ideal, and the lawsuits began flying. Of particular relevance to the issues before this Court is a lawsuit that Goldgroup filed against DynaMexico in a Mexican federal court located in Mazatlán, Sinaloa, Mexico in 2013 ("Goldgroup's Mazatlán Litigation"). In that action Goldgroup sought and received from the Mazatlán court an injunction until issues concerning actions taken at a May 17, 2013 DynaMexico shareholder's meeting could be resolved. Goldgroup's Mazatlán case involves many of the same issues ultimately brought forward in the Colorado arbitration.

On March 10, 2014, Goldgroup filed its Demand for Arbitration with the American Arbitration Association ("AAA") in Colorado under the provisions of the Earn In/Option Agreement. [Doc. No. 21-12.] Shortly thereafter, on April 10, 2014, DynaResource sent a letter to Shashi K. Dholandas with the International Centre for Dispute Resolution (ICDR), a division of the AAA, stating its position that arbitration was not appropriate under the Option Agreement.

[Doc. No. 21-14 at 2] Ms. Dholandas responded in an email message on April 25, 2014, that the ICDR would continue with the arbitration proceeding "unless and until a court order staying the arbitration is presented, or the parties agree to hold the arbitration in abeyance." [Doc. No. 21-15 at 2.] Thereafter, DynaResource, on May 30, 2014, filed Case No. 14-cv-01527-MSK-KMT ("the Krieger Case"), in Denver, Colorado, seeking to stay and enjoin the arbitration proceedings.

In the Krieger Case, DynaResource sought an order and judgment staying the arbitration. (Compl., ¶ 3.) DynaResource informed the court that arbitration proceedings were ongoing, attaching the Demand for Arbitration to its Complaint as Exhibit 1. In its Motion to Compel Arbitration and Stay Case in that same case [Krieger Case Doc. No. 16], Goldgroup confirmed that the arbitration proceedings were ongoing, that David B. Wilson had been appointed as the sole arbitrator, and that a preliminary hearing was scheduled for September 11, 2014. (*Id*., ¶¶ 12-15.)

Plaintiff DynaResource filed a notice of related cases [Krieger Case Doc. No. 3] listing nine related cases, including Goldgroup's Mazatlán Litigation as the eighth case, and a dismissed Dallas, Texas case where DynaResource brought "suit for declaratory relief and damages for breach of corporate resolution, breach of fiduciary duty, misappropriation of trade secrets, usurpation of corporate opportunity, tortious interference with prospective business opportunity, business disparagement, unjust enrichment, civil conspiracy" and which DynaResource represented had been "dismissed/non-suited in deference to Mexican proceedings and jurisdiction" as the ninth case. (*Id.*)

DynaResource filed an Amended Verified Complaint in the Krieger Case on September 8, 2014, acknowledging the arbitration proceedings and reiterating in more detail that a federal court in Mazatlán, Sinaloa, Mexico was proceeding involving shares of DynaMexico that were issued in May 2013 to DynaUSA allegedly in satisfaction of a debt DynaMexico owed to DynaUSA, as well as other issues related to corporate control and management of DynaMexico. (Krieger Case [Doc. No. 19], ¶¶ 1-2.) DynaResource acknowledged that the Mazatlán court had issued an injunction at Goldgroup's request concerning the disputed shares. (*Id*.) DynaResource specifically stated that ". . . unless decided by judicial authorities in Mexico,[6] this Court has jurisdiction to resolve issues of arbitrability." (*Id*., ¶ 9) DynaResource represented that "[t]he threshold issue of whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is presumptively an issue to be decided by the [Krieger] court" (*id*.) and "[t]his court also has jurisdiction to decide whether Goldgroup, by its manipulative litigation conduct, has forfeited and waived any right to arbitrate." (*Id*., ¶ 10.) Neither the Amended Verified Complaint nor any of the briefing submitted to Chief Judge Krieger specifically informed the Colorado court of the existence of any other pending litigation concerning the arbitrability of Goldgroup's claims against DynaResource.

While the Colorado case was pending through the remainder of 2014, in addition to briefing a motion to dismiss filed by Goldgroup and a motion for summary judgment filed by DynaResource, the parties simultaneously continued with the arbitration proceedings before Arbitrator Wilson who issued several procedural and setting orders, including Procedural Order

[6] DynaResource stated later in the Amended Verified Complaint, "[b]efore demanding arbitration, Goldgroup substantially invoked the litigation machinery in Mexico and, at Goldgroup's request, the Mexican Federal Court therein issued an injunction in December 2013 and now exercises jurisdiction over the *res* subject to Goldgroup's Claims in arbitration; . . . ."

No. 1 dated September 30, 2014. (See Arbitator Wilson's "Final Award," [Doc. No. 2-2 at 11.] In Procedural Order No. 1, Arbitrator Wilson dismissed Goldgroup's claims for unjust enrichment and conversion "because those claims did not fall within the scope of the arbitration agreement in Article 8.16 of the Option Agreement, and thus were not arbitrable." (*Id.*) Knowing that the Krieger case was pending, Arbitrator Wilson thereafter deferred decision on all other objections to arbitrability to a later time. (*Id.*) He did not rule on the validity of Section 8.16 of the Earn In/Option Agreement. By November 26, 2014, Goldgroup's motion to dismiss and DynaResource's motion for summary judgment in the Krieger Case were fully briefed pending resolution by the court. On November 14, 2014, Arbitrator Wilson set the arbitration hearing for June, 2015. (Final Award, ¶ 31.)

On December 5, 2014,[7] Dynaresource de Mexico filed its action against Goldgroup Mining, Inc., Goldgroup Resources, Inc. and the American Arbitration Assoc. in Mexico City. (Amparo Order at 12.) The clerk claimed paperwork for service of process was left at the defendant entities' local commercial addresses on December 10 and 11, 2014. *Id.* In sum, the allegations in the Mexico City case were "that the defendants failed to comply with their corporate obligation of not holding itself as the direct owner of fifty percent of the San Jose de Gracia mining project located in the community of San Jose de Gracia, municipality of Sinaloa de Leyva" and the issue of arbitrability of matters and issues raised in the Mazatlán case and for which Goldgroup was seeking arbitration. *Id.*

On December 19, 2014, DynaResource filed a "Supplemental Notice of Related Cases." [Krieger Case Doc. No. 33.] Again, the notice facially looked like the former related case notice,

[7] "Registered" on December 9, 2014.

[Krieger Case Doc. No. 3.] The supplement had nine entries–exactly the same as the first notice. However, a detailed and now hindsight look at the Supplemental Notice reveals that former case number 6, entitled "DynaMexico v. Goldgroup, Keith Piggott, John Sutherland, Minop, Kevin Sullivan, Omar Felix, Francisco Arturo Bayardo Tiznado, File No. 259/2012, Third Criminal Court of Mazatlán, Sinaloa, Mexico (theft and misuse of trade secrets)" inexplicably disappeared. Former cases 7, 8 and 9, became numbers 6, 7 and 8 in the supplemental filing and the following new case appeared without explanation as number 9:

> DynaMexico v. Goldgroup, *et al.*, File No. 1120/2014, 36th Civil Court of the Superior Court of Justice of the Federal District (Tribunal Superior de Justicia del Distrito Federal) (Suit pursuing claims previously asserted in the Texas Action identified in paragraph 8 above, including claim for damages caused by Goldgroup's boasting publicly to be owner of the San Jose de Gracia mining project, and for declaratory relief as to the invalidity of the arbitration provision in the 2006 Option Agreement in light of its inapplicability and Goldgroup's litigation conduct in Mexico).

(Krieger Case [Doc. No. 33]) (hereinafter "Mexico City Case").

On January 19, 2015, Cristhian Osman Marthos Orozco, in his capacity of legal attorney-in-fact for Goldgroup Mining, Inc.,[8] filed an ancillary proceeding in the Mexico City Case,

[8] The Mexican court of appeals noted that this same attorney appeared on behalf of Goldgroup Resources, on other matters in Mazatlán and actively participated in the proceedings. The court listed numerous instances where Cristhian Osman Marthos Orozco had appeared in various proceedings on behalf of Goldgroup Resources, Inc., and had signed documents and represented himself as attorney-in-fact for Goldgroup Resources Inc. (Amparo Order at 15-19.) That court stated that what Mr. Orozco knew as a representative of Goldgroup Mining, he also knew as a representative of Goldgroup Resources, stating "it is evident, that what he knew as a representative of a corporate entity, also knows with respect to the other, since he knew in his double capacity of the existence of the action that originated the formation of the commercial ordinary action 1120/2014, from which the government actions being contested arise, as it is materially impossible that what he knows as an individual, in his capacity of legal representative of a company, ignores it with respect to another, . . . since one person's knowledge cannot be isolated in two; . . . ." (*Id.* at 19-20.)

referenced as an annulment[9], challenging service of process. (Amparo Order at 13.) The Mexican court of appeals would ultimately find that January 19, 2015 would serve as the date Goldgroup "knew" or had notice of the Mexico City Case, including the "alleged illegal service of process."[10] (Amparo Order at 10.)

During the period between March and April, 2015, while there was no activity in the Krieger Case, the parties were filing their Memorials in the arbitration–the equivalent of fully briefing a judicial proceeding. (Final Award, ¶ 36.) By May 11, 2015, the arbitration matter was fully briefed and awaiting only the hearing. (*Id*.) On May 18, 2015, however, the arbitration was suspended for administrative reasons concerning payment of required deposits. In July, 2015, Arbitrator Wilson and the parties agreed to set the arbitration hearing for September 9-10, 2015. (*Id*., ¶ 38.) At DynaResource's request, ostensibly to accommodate DynaResource CEO Diepholz's travel schedule, the hearing was continued to November 16-17, 2015. (*Id*., ¶ 40.).

Additionally, on March 2, 2015, the ancillary proceeding (annulment) in the Mexico City Case was admitted. (Amparo Order at 13.) On April 29, 2015, the "initial Judge issued the corresponding interlocutory judgment in which, as the grievances formulated by the aforementioned defendant were unlawful, he declared said ancillary proceeding unlawful." (*Id.*) Goldgroup appealed this order, and on September 11, 2015, the reviewing court reversed "solely in order to duly execute the service of process to the defendant." (*Id*. at 14.)

Meanwhile, in the Krieger Case, on August 27, 2015, the undersigned Magistrate Judge issued a Recommendation on Goldgroup's Motion to Dismiss, recommending that the motion be

[9] This proceeding appears roughly similar to Motions to Dismiss under Fed. R. Civ. P. 12(b).
[10] This date is important to the amparo action because an amparo action must be filed within 15 days of the action contested, citing to Art. 17, Section XIV of the Amparo Law. (Amparo Order at 11.)

granted and that DynaResource's Petition to vacate the arbitration proceedings be dismissed for lack of subject matter jurisdiction. (Krieger Case [Doc. No. 36].) DynaResource's motion for summary judgment remained pending before Chief Judge Krieger, not having been referred for recommendation by this court.

On September 29, 2015, Chief Judge Krieger issued her Order addressing the Recommendation by this court, Goldgroup's motion to dismiss, and DynaResource's motion for summary judgment. ("Krieger Order" [Doc. No. 39].) Chief Judge Krieger rejected the Recommendation of this court and denied Goldgroup's Motion to Dismiss. The District Court also denied DynaResource's motion for summary judgment. Judge Krieger stated that her responsibility was to fulfill a "narrow duty . . . to determine whether an agreement to arbitrate exists" in the Earn In/Option Agreement and "to determine whether the claims fall within the agreement to arbitrate. (*Id*. at 12.) She found, looking solely at the four corners of the Earn In/Option Agreement, that the parties had agreed to arbitrate disputes "arising under" the Agreement. Judge Krieger reserved the bulk of her analysis to examine whether the claims brought by Goldgroup were based on alleged breaches of the terms of the Earn In/Option, ultimately finding that the claims, at least facially, could be said to arise out of the Earn In/Option Agreement. (*Id*. at 13.) Finally, Judge Krieger held that other issues, including "whether Goldgroup waived its right to proceed outside of a Mexican forum, whether it should be judicially estopped, etc." were questions to be brought before the arbitrator. (Krieger Order at 11.)

Because procedurally Goldgroup had not had the opportunity to file a motion for summary judgment, and in light of her findings concerning arbitrability, Judge Krieger ordered

that DynaResource show cause why judgment should not be entered in favor of Goldgroup on the issue of proceeding with the arbitration. On October 20, 2015, in response to the show cause order, DynaResource produced an October 5, 2015 Order signed by Judge Julio Gabriel Iglesias Gomez in the Mexico City Case. [Doc. Nos. 21-26 through 21-28; also English translation Doc. No. 21-21] ("Mexico City Order").[11] (*See also* Amparo Order at 14-15.)

In the Mexico City Order, the court ruled against allowing arbitration and resolved the case against Goldgroup, awarding DynaResource almost $48,000,000.00 in United States dollars as damages. The Mexico City Order found, *inter alia*, that the arbitration clause in the Option Agreement was "notoriously inefficient and unenforceable." (*Id*. at 44.) Further, the Mexico City Order declared that the American Arbitration Association ("AAA") "shall abstain from hearing the arbitration procedure number 50 501 T 00226 14" or any other arbitration procedure that may be attempted by Goldgroup against DynaResources [sic]." (*Id*.)

In the Krieger Case, Dyna Resource, as part of its show cause response, having filed both the Krieger Case and the Mexico City Case, argued that the Mexico City Order took precedence over the Krieger Order, based, at least in part, on the Mexico City Order's holding that under Mexican law the arbitration clause of the Earn In/Option Agreement was invalid and unenforceable. (Krieger Case [Doc. Nos. 40-42].)

[11] The Mexico City Order appears in the record at several locations. For ease of reference and consistency, when citing to the Mexico City Order, this court cites to Doc. No. 21-21, utilizing the page numbers applied by the court's electronic filing system in the upper right hand corner of each page. This version of the English translation of the Mexico City Order contains highlighting that the court does not consider but nonetheless references this version of the document over others simply because the court document numbering is not obliterated by repeated filing as is the case with several of the versions that have not been highlighted.

Meanwhile, on October 13, 2015, the ICDR notified Arbitrator Wilson and the parties of a press release issued by DynaUSA, stating that a Mexico City court had enjoined the AAA from going forward with the arbitration. (Final Award, ¶ 44.) The AAA claimed to know nothing of the case at that time and ordered the parties to provide information concerning the allegations in the press release. Goldgroup responded,

> Regarding your request of information about the press release issued by Dyna, Goldgroup answers the following:
>
> Goldgroup has no knowledge of the actions mentioned in said press release.
>
> Goldgroup has informed us that the complaint was never served to Goldgroup, it does not recognize any of the claims mentioned in such press release and is of its belief that such claims are without merit. The Company is reviewing its options and intends to exercise all of its legal rights in order to have the purported judgement discussed in the Release disregarded, set aside or otherwise overturned, and further will seek damages for misrepresentation against Dyna and all relevant parties.

(*Id.*) This statement, while not an outright falsehood, was certainly misleading absent further elaboration.

On November 3, 2015, the Amparo Case was filed by Enrique Alberto Peralta Rodriguez representing Goldgroup Resources, Inc., in the Common Correspondence of the District Courts in Civil Matter in Mexico City, requesting protection of the Federal Justice, against the following authorities and actions: 1.) Lack of Service of Process for the original action 1120/2014, and 2) Set aside the October 5, 2015 Order of the Mexico City court.

On November 9, 2015, counsel for DynaResource provided a copy of the translated October 5, 2015 Mexico City Order to the arbitrator.

On November 11, 2015, Arbitrator Wilson issued Procedural Order No. 5, finding that DynaResource had engaged in improper forum shopping and that the Mexico City court had proceeded not only without any opposing parties legally brought before it, but also without knowing about either Procedural Order No. 1 or Chief Judge Krieger's orders concerning arbitrability. Arbitrator Wilson refused to stay or suspend the arbitration proceedings at DynaResource's request. On November 13, 2015, DynaResource advised Arbitrator Wilson it would not appear at the November 16, 2015 hearing. (Final Award, ¶¶ 55-56.) On November 16, 2015, the arbitration hearing proceeded. (Final Award, ¶ 56.) Neither counsel for DynaResource nor Mr. Diepholz appeared. (*Id*.)

On April 1, 2016, then in receipt of the Mexico City Order, Chief Judge Krieger ordered the parties to appear for an interim case management conference. [Krieger Case, Doc. No. 43.] At that time, seven months after Judge Krieger's original order and six months after DynaResource had produced the Mexico City Order to Judge Krieger in response to her show cause order, Goldgroup had neither Answered the Verified Complaint nor filed a motion for summary judgment based on the rulings of the District Court on September 29, 2015. On April 11, 2016, DynaResource voluntarily dismissed its Colorado federal case, which terminated the need for the case management conference. [Krieger Case Doc. No. 44.]

On August 24, 2016, Arbitrator Wilson issued his Final Award. Arbitrator Wilson awarded a variety of monetary and declaratory relief, including ordering: (1) DynaUSA to pay Goldgroup a total of $ 403,913.92, including (a) $ 325,000.00 for

attorneys' fees and costs attributable to Holland & Hart, (b) $ 2,795.00 for the cost of the hearing transcript, and (c) $ 76,118.92 for attorneys' fees and costs attributable to Loperena, Lerch y Martin Del Campo; and (2) that the parties conduct certain activities relating to the Option Agreement, DynaMexico's Board of Directors, and DynaMexico's Management Committee.

Goldgroup filed this case on October 12, 2016 to Confirm the Arbitration Award pursuant to 9 U.S.C. §§ 9, 204, 207 and 302.

On August 24, 2017, the First District Court of the Eleventh Region Auxiliary Center by Alejandro Bermudez Sanchez**,** First District Judge in Coatzacoalcos, Veracruz, entered its order on the appeal in Indirect Amparo Action 945/2015, dismissing Goldgroup's appeal of the Mexico City Order. [Doc. No. 42-1.]

ANALYSIS

The Earn In/Option Agreement dated September 1, 2006 [Doc. No. 2-1] provided Goldgroup with a sole and exclusive right and option to earn up to a 50% equity interest in the form of common shares of DynaMexico in exchange for Goldgroup providing up-front funding to develop a Mexican mining concession. Germane to this proceeding, the Agreement provides

> 8.5 Governing Law/Jurisdiction. Subject to the applicability of Mexican law in respect to the shares of Dyna Mexico and the acquisition thereof, the venue and jurisdiction for any dispute related to this Agreement shall be in Denver, Colorado.

(*Id.* at 14.) Further, the Earn In/Option Agreement stated,

> 8.16 Dispute Resolution.
>
> All questions or matters in dispute under this Agreement shall be submitted first to mediation and then if no resolution to binding arbitration pursuant to the terms hereof.

> (a) Any dispute shall first be submitted to a mediator, selected by the parties, by agreement at a neutral location, agreed to by the parties. All costs of the mediation shall be borne equally by the parties to the dispute.
>
> (a) . . . .
>
> (b) The party desiring arbitration shall refer the dispute to binding arbitration in Denver, Colorado under the Rules of American Arbitration Association ("AAA") by a single arbitrator selected by the parties. If the parties cannot agree, an arbitrator from the Denver area shall be selected by the AAA office in Denver. The arbitrator's decision shall be final, binding and non-appealable and may be enforced in any court. The parties shall each pay a pro rata share of the arbitrator's and AAA's charges for the arbitration. The arbitrator may, in his or her sole discretion, award attorney fees and out-of-pocket expenses to that party which the arbitrator, in its sole discretion, determines is the prevailing party.

(*Id.* at 16.)

A. Judge Krieger's Order

When Goldgroup filed its initial demand for arbitration with the AAA, it alleged that it exercised its options under the Agreement in 2011, obtained its 50% equity, and availed itself of the opportunity to appoint two of the four members of Dyna Mexico's Board of Directors (those four board members then jointly appoint a fifth). Goldgroup stated that thereafter

> in May 2013, Dyna Mexico purportedly convened a "shareholder's meeting" without informing Goldgroup or their affiliated Directors, at which Dyna Mexico voted to issue additional shares of its stock to a related entity, Dyna USA, ostensibly in exchange for Dyna USA forgiving certain loans it had made to Dyna Mexico. The effect of the issuance of additional stock diluted Goldgroup's equity stake from 50% to 20%.

(Krieger Order at 1-2). On May 30, 2014, DynaResource filed the Krieger Case arguing that the Option Agreement expired upon the parties'complete compliance with its terms in 2011–upon Goldgroup making the final scheduled capital contribution and receiving

its 50% stake in Dyna Mexico–and thus, that the agreement and its arbitration clause were no longer operative.[12]

Judge Krieger described the claims in her case, brought by DynaResource under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 *et seq*., as

> (i) a declaration "that the Federal Court . . . in Mexico has Exclusive Jurisdiction over the *Res*" (the *Res* being Golgroup's (sic) claims, apparently); (ii) a request for a stay of the Denver arbitration and an injunction against Goldgroup continuing to seek arbitration of the claims pending a decision by the Mexican courts; (iii) a declaration that Goldgroup's claims are not arbitrable because they do not arise under the Option Agreement; and (iv) a declaration that "by its Actions and Statements, Goldgroup has Waived, Forfeited, and is Estopped from Compelling Arbitration," which is essentially an argument for judicial estoppel.

(*Id*. at 3.)

In the Krieger Order, the court first addressed jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("the New York Convention"), which holds "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate], shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (Krieger Order at 5-6 [citing 21 U.S.T. 2517, Art.II, § 3].) In connection with Goldgroup's motion to dismiss, Judge Krieger found that "[t]he claims in Goldgroup's Demand for Arbitration do not invoke federal law . . . ." (Krieger Order at 5.) Further the court found, "At least on their face, the Plaintiffs' claims meet the four requirments" for jurisdiction under the New York convention. (*Id*. at 6.) Finding that the matter

[12] Judge Krieger stated in her Order "Indeed, the Plaintiffs contend that, upon becoming a shareholder, Goldgroup became bound to Dyna Mexico's bylaws, which prohibit foreign shareholders from 'invok[ing] the protection of his/her/its government,' although it is not clear how this provision would apply to Goldgroup, a Canadian entity, seeking arbitration in the United States."

met the general criteria to fall under the New York Convention, the court then addressed whether the District Court could entertain actions seeking to stay or halt arbitration in addition to actions seeking to compel arbitration. Following *CRT Capital Group v. SLS Capital, S.A.*, 63 F. Supp.2d 367, 372-74 (S.D.N.Y 2014), Chief Judge Krieger found that "[t]he Court therefore may enjoin an arbitration proceeding governed by the New York Convention when the parties have not entered into a valid and binding arbitration agreement or where the claims are not within the scope of an arbitration agreement." (Krieger Order at 10 [emphasis added] [citing *CRT Capital Group*, 63 F. Supp. 2d at 376].) Faced with a facially valid contract between the parties, Chief Judge Krieger denied Goldgroup's motion to dismiss and turned her attention to DynaResource's motion for summary judgment.[13]

Chief Judge Krieger found that the issue of arbitrability–whether or not a contract creates a duty for the parties to arbitrate the particular grievance–is undeniably an issue for judicial determination, citing *AT &T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Chief Judge Krieger found that the Court's role was limited in determining the threshold question of arbitrability and, to that end, the court should examine two major issues: (i) whether the parties contractually agreed to arbitrate disputes and (ii) whether the arbitration clause in a binding contract applies to the particular type of controversy. (Krieger Order at 11.) Chief Judge Krieger found that all other questions raised by the parties should be left to the arbitrator if the court found arbitration to be appropriate. (*Id*.)

Scrutinizing the two issues with respect to the facts before her, Judge Krieger first found "there can be no dispute that the parties have agreed to arbitrate disputes arising under the Option

[13] As the case was postured, then, there was no pending motion for summary judgment on the part of Goldgroup, having lost its motion to dismiss only at that moment.

Agreement." (*Id*.) Importantly, Judge Krieger did not address the legality of the Earn In Option Agreement itself, nor the legal validity of the arbitration clause under Mexican law. Specifically Judge Kreiger found that

> "the Option Agreement expired by its terms, Goldgroup has waived the ability to invoke arbitration in the U.S. by agreeing to Dyna Mexico's Bylaws, Mexican courts are already hearing the same matters, Goldgroup should be judicially estopped from raising these claims, the claims are meritless, etc.– nearly all of these are matters that are outside the narrow scope of this Court's threshold arbitrability determination . . . ."

(*Id*. at 14.)

After examining the record, Chief Judge Krieger also found that "Goldgroup's Amended Demand for Arbitration expressly invokes provisions of the Option Agreement and that at least some of its claims are, at least facially, based on alleged breaches of the terms of that Agreement." (*Id*. at 13.) She also found that "the Option Agreement remained in effect in some respects after 2011, and thus, the parties' agreement to arbitrate disputes arising under that Agreement remain operative as well." (*Id.* at 14.)

In closing, Judge Krieger stated, "Although the court does not go so far as to instead direct summary judgment in favor of Goldgroup, *see* Fed. R. Civ. P. 56(f), the effect of the findings in this Order would seem to be fatal to the Plaintiffs' continued maintenance of this suit" (*id*. at 15), and she thereafter ordered DynaResource to show cause in writing, within 21 days, why the Court should not grant judgment in favor of Goldgroup on all claims. The only "claims" Goldgroup brought in the Krieger case, however, were to compel the arbitration and stay the Krieger Case pending the outcome of arbitration. (Krieger case, Motion to Compel Arbitration.)

Procedurally, the show cause mechanism was necessary because Goldgroup had not filed a cross motion for summary judgment in the Krieger Case. In fact, as noted, Goldgroup had not even filed an Answer to DynaResource's Complaint. At that point, Goldgroup was proceeding in the case in light of the Magistrate Judge's Recommendation that Goldgroup's motion to dismiss be granted. Had the District Court accepted the recommendation, the arbitration would have proceeded unabated, a result favorable to Goldgroup thus obviating any need to file its own motion for summary judgment. It was only upon the entry of the Krieger Order, first refusing to accept the recommendation of the Magistrate Judge in favor of dismissal, that Goldgroup might have considered a motion for summary judgment. However, even then, given the Chief Judge's ruling that the Option Agreement contained a valid arbitration clause and that the allegations in the arbitration did, at least facially, allege violations of the Option Agreement, rendering the matter appropriate for arbitration proceedings, any incentive to file for summary judgment was thwarted. (Krieger Order at 10.)

As of September 29, 2015, then, there was a valid, but not final, Order from the District Court in the District of Colorado directing that the ongoing arbitration commenced by Goldgroup was proper and that the arbitrator should decide all remaining questions.

The other shoe, however, dropped on October 20, 2016, when, in response to Chief Judge Krieger's Order to Show Cause, DynaResource filed the Mexico City Order. Upon receipt of that Order, instead of entering judgment in Goldgroup's favor as she clearly intended from the September Krieger Order, Chief Judge Krieger instead called the parties in for an interim case management conference. (Krieger Case [Doc. No. 43].) Because after the Krieger Order no Answer was filed by Goldgroup and there were no Rule 16 motions pending, DynaResource and

Mr. Diepholz were entitled to and did file a motion to voluntarily dismiss the Krieger Case, which was ultimately granted.

B. The Mexico City Order

An examination of the previous litigation involving the parties, gleaned by examining the Notice of Related Cases filed in this case [Doc. No. 11], shows that up until the Krieger case was filed on May 30, 2014, DynaResource as plaintiff had brought seven cases against Goldgroup, all filed in Mazatlán, Mexico, with the exception of one action brought in Dallas, Texas. This venue selection is unremarkable since Plaintiff DynaMexico is a Mexican corporation with its registered office in the City of Mazatlán, State of Sinaloa, United Mexican States. Plaintiff DynaUSA is a Delaware corporation with its principal place of business in Irving, Texas, United States of America. K.D. ("Koy W.") Diepholz, both the Chairman and Chief Executive Officer of DynaUSA and the President of the Board of Directors of DynaMexico, is a resident of the state of Texas. Therefore all cases brought by DynaResource had venue in Mexico except for one case brought in the "residence" of DynaUSA and the federal case before Judge Krieger seeking to block the Colorado arbitration.

Defendant Goldgroup is a British Columbia corporation with its principal place of business in Vancouver, British Columbia, Canada. Goldgroup, as Plaintiff, had brought two cases against DynaResource, both in Mazatlán, Mexico, the "residence" of DynaMexico.

To date, all litigation surrounding the multitude of issues involved with these entities were brought in Mexico,[14] under Mexican law, except for one Texas case, the Colorado

[14] The American Arbitration Association, one of the defendants in the Mexico City Case, apparently has a Mexican address of Calle Morelos Numero 67-5 Piso, Colonia Juarez en la

arbitration with its concomitant federal proceedings to block the arbitration in the Krieger case, and this case seeking to enforce the Final Award rendered from the arbitration. Clearly, the parties were and are accustomed to proceeding in Mexican courts under Mexican law concerning the Mexican mining operation.

This history of Mexican litigation was important to the Mexico City court regarding its consideration of waiver of the arbitration provision in the Earn In/Option Agreement. Of particular importance was the case filed by Goldgroup in Mazatlán, Sinaloa in 2013 [Doc. No. 21-5] ("Goldgroup's Mazatlán Litigation"). In Goldgroup's Mazatlán Litigation, Goldgroup requested a Mexican federal court judge to, among other things: (a) declare invalid a May 17, 2013 DynaMexico shareholders meeting and all actions taken during that meeting; (b) direct the cancellation of the 300 treasury "B" Series shares of DynaMexico stock that were issued to DynaUSA pursuant to the May 17, 2013 meeting; (c) declare the Diepholz POA void; (e) grant Goldgroup's challenge to DynaMexico's 2012 financial statements and declare that they were not properly approved; and (f) award Goldgroup money damages. These claims are nearly identical to those at issue in the Colorado arbitration. On December 13, 2013, the Mazatlán federal judge entered an order which preserved the status quo between the parties on this issue pending a trial on the merits. (*Id*.) Having prevailed on its requested injunctive relief, just a few months later, Goldgroup, the Mazatlán Plaintiff, filed its request for arbitration in Denver, Colorado.

As previously noted, DynaResource filed the Mexico City Case in December 2014. As of January 19, 2015, some nine to ten months prior to entry of the Krieger Order, Goldgroup had

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Delegacion Cuauhtemoc, C.P. 06600, Mexico Distrito Federal. This may be why the case was brought in Mexico City.

taken action in the case (technically ancillary to the case) to complain of improper service.[15] Goldgroup, apparently confident that it would prevail in the ancillary action regarding service in spite of losing its first bid in April 2015, took no active part in the Mexico City case. Although service of process was ultimately considered to have been flawed, it was remedied on or about September 11, 2015. The Mexico City Order states ". . . the accused parties[16] were summoned, who declined to answer to the complaint filed against them, ..." (Mexico City Order [Doc. No. 21-21] at 2.)

Six days after the Krieger Order was entered, the Mexico City Order was filed. The Mexico City Order is 47 pages in length and contains numerous pages of detailed findings of fact and conclusions of law based on controlling Mexican procedural and substantive law. At the conclusion of the Mexico City Order are thirteen separate and distinct "orders." Of particular note to the issue before this court are Orders six and seven which state

> SIX. Based on the provision of Article 1424 of the Commercial Code, it is judicially declared that the arbitration agreement agreed upon in Clause 8.16 of the Earn In Option Agreement dated September one, year two thousand six, is notoriously inefficient and unenforceable.
>
> SEVEN. It is judicially declared that any dispute that might exist arising from the Earn In Option Agreement shall be followed and resolved under Mexican law and before the judges of the Mexican State with jurisdiction to do so, for having tacitly waived both the plaintiff and defendant, to the arbitration clause.

(Mexico City Order at 44.)[17]

[15] There is no evidence of any activity undertaken by the AAA in the Mexico City Case, and this court assumes, therefore, that it never received any notice of the pendency of this case against it.
[16] According to the Order, which lacks a formal caption, the accused parties are Goldgroup Mining, Inc., Goldgroup Resources, Inc. and American Arbitration Association.
[17] Orders 8, 9, and 10 all find that the American Arbitration Association has no jurisdiction to hear any matters purporting to arise from the Earn In/Option Agreement of September 1, 2006.

While acknowledging that parties may agree to arbitration of their disputes pursuant to Mexican law, Article 1424 of the Mexican Commercial Code provides that when an arbitration clause is contested as being "void, ineffective or unenforceable" a "judicial decision on the annulment action would be necessary." (*Id*. at 38.) The court noted that, even in the event an arbitration clause was valid at the time of its creation by the parties, such a clause could stop having effect in the following instances: 1) "For having revoked the arbitration agreement"; 2) "For having settled the dispute"; 3) "By statute of limitations of the deadline for filing the complaint"; and 4) "Where the dispute has already been decided by another local or state court." (*Id*. at 39 [citing to Period: Ninth Period Record: 175595 Instance: Collegiate Circuit Courts Type of Judicial Precedent: Isolated Source: Weekly Federal Court Report and its Gazette Volume XXll, December 2005 Matter(s): Civil Judicial Precedent: l.3o.C.521 C Page: 2623 COMMERCIAL ARBITRATION. CRITERIA FOR DETERMINING THE INEFFECTIVENESS OF THE AGREEMENT].) The Mexico City court stated,

> The possibility of removing the state justice from intervention in a case and to submit it to arbitration is a manifestation of the power of individuals to waive their individual rights and to establish legal devices to which they wish to submit. As a result of said freedom to establish the arbitration agreement, obvious consequence arises that it must not subsist in any event, but, on the contrary, the contractors are in a position to revoke it when deemed convenient, or not to enforce it, arising, therefore, the jurisdictional power of State bodies again.

(*Id*. at 39-40.) The court found under Article 1094 of the Mexican Commercial Code that when one of the parties appears as a plaintiff before a judicial tribunal with a complaint challenging the arbitration clause and in the event "the other one that is updated in the event that the defendant responses to it or opposes[,]" the arbitration should cease and allow the jurisdictional courts to "resume the power to decide upon their dispute . . . ." (*Id*. at 41.) The Mexico City judge then

recounted the evidence upon which he made the finding that "the Parties in several occasions have tacitly submitted to the jurisdiction of jurisdictional courts . . . ." (*Id.*) Included in the evidence were other cases that the parties had brought in Mexico previously, including the Goldgroup Mazatlán Litigation. Based on that evidence, the court held that pursuant to Article 1294 of the Mexican Commercial Code, both parties in the case had "submitted voluntarily to the jurisdiction of courts in this country, thus waiving the arbitration agreement . . . ." (*Id.*) Therefore, the judge held that according to Article 1424 of the Mexican Commercial Code, "the arbitration agreement agreed upon in Cause 8.16 of the Earn In Option Agreement dated September one, year two thousand six, is notoriously inefficient and unenforceable." (*Id.* at 42.) The court also held,

> It is judicially declared that any dispute that might exist arising from the Earn In Option Agreement shall be followed and resolved under the Mexican law and before judges of the Mexican State with jurisdiction to do so, for having tacitly waived both the plaintiff and defendant, to the arbitration clause.

(*Id.*) The Mexico City court then ordered the American Arbitration Association to abstain from hearing arbitration 50 501 T 00226 14 because it "has no jurisdiction to hear any dispute or interpretation arising from the Earn In Option Agreement . . . ." (*Id.*) Further, the court stated

> It is judicially declared that any dispute that might exist arising from the Earn In Option Agreement shall be followed and resolved under the Mexican law and before judges of the Mexican State with jurisdiction to do so, for having tacitly waived both the plaintiff and defendant, to the arbitration clause.

(*Id.*)

C. Conclusion

"Comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.' " *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). Generally, as a matter of comity, the judgments of foreign courts are given conclusive effect and full faith and credit when sued upon in American courts, provided they are not tinged with fraud and the courts from which emanated had jurisdiction over the subject matter and over the parties. *Gull v. Constam*, 105 F. Supp. 107, 108 (D. Colo. 1952). Recognizing the long held and still applicable principles set out in *Hilton*, 159 U.S. at 205, courts within the Tenth Circuit have stated, "courts will generally recognize the judgments of foreign courts if (1) the foreign court had personal and subject matter jurisdiction; (2) the defendant in the foreign action had adequate notice and opportunity to be heard; (3) the judgment was not obtained by fraud; and (4) enforcement will not contravene public policy." *Phillips USA, Inc. v. Allflex USA, Inc.*, 150 F.R.D. 198, 201 (D. Kan. 1993); *Broda v. Abarca*, No. 11-CV-00286-REB, 2011 WL 900983, at *4 (D. Colo. Mar. 15, 2011). *See also MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1066–67 (10th Cir. 2007) (Comity is not an inexorable command and a request for recognition of a foreign judgment may be rebuffed on any number of grounds.).

"No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). "[C]omity never obligates a national forum to ignore 'the rights of its own citizens or of other persons who are under the protection of its laws.' " *Id.* at 943 (quoting *Hilton*, 159 U.S. at 164); *Matter of Arbitration*

Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907, 913 (D.D.C. 1996).

In this case, of course, only DynaResource, Inc. is a citizen of the United States and it is DynaResource collectively that is encouraging enforcement of the Mexico City Order. Outside the Order's effect on the parties, there are no interests of the United States at issue here.

The issue now before this court is not really one of comity, although the general principals of the theory are instructive. As noted previously, on November 11, 2015, after being informed of the Mexico City Order, Arbitrator Wilson issued Procedural Order No. 5, finding that DynaResource had engaged in improper forum shopping and that the Mexico City court had proceeded not only without any opposing parties legally brought before it, but also without knowing about either Procedural Order No. 1 or Chief Judge Krieger's orders concerning arbitrability. (Final Award, ¶ 55,) Upon thorough review of the history of the litigation, especially with the clarification of proceedings provided by the Amparo Order to which Arbitrator Wilson was not privy, Arbitrator Wilson was incorrect in this determination. The several references Arbitrator Wilson makes to fraudulent or improper motives of DynaResource in pursuing its legitimate remedies under Mexican law are largely a result of Goldgroup's misleading statements, which gave the false impression that DynResource was proceeding surreptitiously in an effort to circumvent the orders of United States judges and arbitrators. Arbitrator Wilson appears to be much affronted by what he perceives to be an attack on the justice system, which in reality is not only proper procedure under Mexican law but also the usual course of business for these highly litigious parties.

This court finds that DynaResource did not engage in improper forum shopping by bringing the Mexico City Case, but rather, under Mexican law–which all parties agree should be applied–brought the action properly under the Mexican Commercial Code to contest the legality and applicability of the arbitration clause. Judge Krieger was provided with notice of the Mexico City case, although this court laments that DynaResource did not make the subject matter and bases for the Mexico City Case more clear to the U.S. court before either court issued rulings. Nonetheless, the Mexico City action was properly pending at the same time as the Krieger Case, and Goldgroup was well aware of both cases. The only area where the Krieger Order and the Mexico City Order truly conflict is in Chief Judge Krieger's finding that certain issues of arbitrability–such as whether the parties' pursuit of litigation outside the arbitration provision creates waiver of the self-agreed arbitration provision voluntarily entered into between the parties–should be presented to the arbitrator to decide. Under Mexican law, which Judge Krieger did not address on this issue, the matter may be brought before a Mexican judicial tribunal for decision. Judge Krieger limited her judicial participation to very narrow grounds, based on domestic laws concerning arbitration.

Goldgroup's choice to proceed in Mexico City under ancillary proceedings rather than on the merits was knowing and voluntary and presumably made after analyzing the risks associated therewith. Unlike the characterization made by Arbitrator Wilson, the Mexico City Order did not address "whether Goldgroup's claims in this arbitration are arbitrable" (*id*., ¶ 55), but rather addressed a more preliminary question: whether the arbitration provision in the Earn In/Option Agreement was valid and enforceable under Mexican law. Upon the Mexico City court determining that the provision was unenforceable, there was no need for the Mexico City Court

to address Procedural Order No. 1 or any other order issued by the arbitrator, nor was there any need to address Judge Krieger's interlocutory order concerning arbitrability of certain claims. Without a valid arbitration clause between Goldgroup and DynaResource, neither the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention) (codified at 9 U.S.C. § 201, et seq.) nor the Inter-American Convention on International Commercial Arbitration (the Panama Convention) (codified at 9 U.S.C. 301, et seq.) were applicable. And, finally, under the laws of the United States, arbitration awards made in the absence of jurisdiction may be vacated by a court when the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or where the arbitrator exceeded his powers. 9 U.S.C. § 10.

As the Supreme Court has stated, "the 'who' (primarily) should decide arbitrability question . . . is rather arcane," and "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers" when they enter into an arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). Arbitration itself is a "matter of contract," *Shaw Grp. Inc. v. Triplefine In'l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003) (quoting *AT & T Techs. v. Commc's Workers of Am.,* 475 U.S. 643, 648 (1986), and, just as a party can only be forced to arbitrate the *merits* of a dispute where it is clear that they agreed to arbitrate those merits, a party can only be forced to arbitrate the *arbitrability* of a dispute where it can be said with certainty that the parties agreed to arbitrate the issue of arbitrability, *Telenor Mobile Comm'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 351 (S.D.N.Y. 2007). A reviewing court should not "force" the parties "to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options,* 514 U.S. at 945.

See China Minmetals Materials Imp. & Exp. Co., Ltd., 334 F.3d 274, 288 (3d Cir. 2003) (noting that "every country" that allows arbitrators to determine their own jurisdiction also "allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed").

This court finds that the Krieger Order was made after a four-corners review of a presumably valid Earn In/Option Agreement containing a presumably valid arbitration clause that appeared to bind the parties to arbitration in Colorado, a foreign forum to all parties.[18] However, under the Mexican Commercial Code as set forth in detail in the Mexico City Order, the parties had a right to have a judicial determination regarding the legality of the Agreement itself and the arbitration clause contained therein, made by a court of jurisdiction in Mexico, applying Mexican law. Once the judicial determination was made that the parties had, by their litigation activities prior to the invocation of arbitration proceedings, waived their agreement to arbitrate thus rendering the arbitration clause of the Earn In/Option Agreement invalid, the case as it was presented originally to Judge Krieger changed dramatically. It appears that Chief Judge Krieger was well aware of the change in underlying circumstances, given her refusal to enter judgment in favor of Goldgroup and the setting of an interim case management conference instead.

In light of the non-finality of Judge Krieger's Order and given the change in the legality of the Earn In/Option Agreement's arbitration clause and the Order of the Mexico City Court that arbitration in the United States was unauthorized and must be enjoined, Arbitrator Wilson

[18] Even DynaResource, Inc. is not incorporated in nor is its principal place of business in the Colorado. Why the parties selected Colorado as a forum for any proceedings in this case remains a mystery, but not one which needs to be solved today.

was well outside his authority to proceed with the arbitration proceedings, especially without the participation of DynaResource, which, up until the Mexico City Order, had actively participated in the case albeit under protest. Pursuant to the Federal Arbitration Act (FAA), "an arbitration award may be vacated if . . . the arbitrator exceeded his powers." 9 U.S.C. § 10(a)(4). Not only had a Mexican court specifically ordered that the arbitration not proceed, it was clear that the Mexico City Order represented a sea change in the Krieger Case that should have been addressed by that court prior to any hearing or orders being issued in the pending arbitration.

Therefore, for the foregoing reasons, this court respectfully

RECOMMENDS that Goldgroup's "Application to Confirm Arbitration Award" [Doc. No. 2] be **DENIED**; and DynaResource, Inc.'s Petition for Nonrecognition of Foreign Arbitral Award and/or Motion to Vacate Arbitration Award" [Doc. No. 21] be **GRANTED** and the Final Award [Doc. No. 2-2] be **VACATED**.

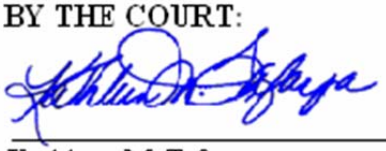
ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to

make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999) (stating that a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059–60 (stating that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (holding that cross-claimant had waived its right to appeal those portions of the ruling by failing to object to certain portions of the magistrate judge's order); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (holding that plaintiffs waived their right to appeal the magistrate judge's ruling by their failure to file objections). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (stating that firm waiver rule does not apply when the interests of justice require review).

Dated this 13th day of February, 2018.

BY THE COURT:



Kathleen M. Tafoya
United States Magistrate Judge