No. ___

IN THE SUPREME COURT OF THE UNITED STATES

JUAN CARLOS CELESTINO CODERCH MITJANS,
Applicant,

v.

EGI-VSR, LLC,

APPLICATION FOR A STAY OF PROCEEDINGS PENDING A PETITION FOR A WRIT OF CERTIORARI TO THE HONORABLE CLARENCE THOMAS

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the
United States and Circuit Justice for the Eleventh Circuit

Christopher J. King
Counsel of record
Kevin P. Jacobs
Peter W. Homer
HOMER BONNER JACOBS ORTIZ, P.A.
1200 Four Seasons Tower
1441 Brickell Avenue
Miami Florida 33131
(305) 350-5192
cking@homerbonner.com

Counsel for Applicant

CORPORATE DISCLOSURE STATEMENT

Applicant Juan Carlos Celestino Coderch Mitjans is an individual and therefore there is no parent company or publicly held company holding 10% or more of its stock to disclose.

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Applicant Juan Carlos Celestino Coderch Mitjans ("Coderch") respectfully applies to stay proceedings in the district court pending a decision on his forthcoming petition for a writ of certiorari, which will be filed on or before November 23, 2020 consistent with Supreme Court Rule 13.1 and this Court's March 19, 2020 Order in response to ongoing public health concerns relating to COVID-19.

INTRODUCTION

This case, involving the confirmation of an arbitration award under the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), S. Treaty Doc. No. 97-12, 1978 WL 219648 (June 9, 1978), raises a vitally important and recurring issue concerning international arbitration. Applicant Juan Coderch appealed to the Eleventh Circuit a district court order confirming a Chilean arbitration award that directed him and several other parties to purchase from EGI-VSR, LLC ("EGI") shares in a Chilean wine company pursuant to a put right. The arbitral award ordered the purchase under a complex contractual formula in the Shareholders' Agreement, but the award did not perform the calculations. That left several unresolved, material, and arbitrable disputes over the amount of the purchase price. Mr. Coderch asked the district court to return the matter to arbitration to resolve them. Instead, the district court resolved the disputes itself, adopting EGI's proposed calculations. In the decision below, the Eleventh Circuit held the disputes over the purchase price not only posed no

obstacle to confirmation of the award under the Federal Arbitration Act ("FAA"), but the disputes could be decided by the district court, rather than the arbitrator, under "U.S. law"—specifically the "breach day" rule used for converting foreign judgments to U.S. dollars. App., *infra*, 20a-21a. The Eleventh Circuit nonetheless vacated the district court's order, finding the district court misapplied the breach day rule and erroneously entered a money judgment rather than an order of specific performance. *Id*.

This decision cannot be reconciled with the text of the FAA or with this Court's precedents and the precedents of other courts of appeals. It is beyond dispute that the "'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). The decision below creates an exception to this fundamental law. As it has in many other recent cases, this Court should grant certiorari to correct the Eleventh Circuit's erroneous application of the FAA and reaffirm the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

A stay of the district court proceedings pending the disposition of Mr. Coderch's forthcoming petition is necessary because he will suffer irreparable harm if the Court does not stay this case. EGI has moved for entry of a new judgment, forcing Mr. Coderch to take discovery and contest EGI's proposed re-calculations and revised form of judgment. Mr. Coderch is under a September 21, 2020 deadline

to respond. Forcing Mr. Coderch to engage in ongoing litigation over the purchase price will forever deprive him of his bargained-for right to resolve his claims privately through arbitration. The litigation also potentially threatens to expose Mr. Coderch to protracted sanctions proceedings, which EGI has made clear it will seek for any nonpayment of an eventual judgment of specific performance. A stay will prevent these harms while also ensuring that the parties and the courts do not waste time and resources litigating purchase price issues that are likely to be sent to arbitration after this Court's review.

This case readily satisfies the standard for a stay of district court proceedings. As a vehicle and on its merits, it is an ideal candidate for certiorari. There is a significant possibility that, after granting certiorari, this Court will reverse the Eleventh Circuit's erroneous decision. The harm Mr. Coderch will suffer from being compelled to litigate cannot be remedied by a later order sending the case to arbitration after entry of a new judgment on the purchase price in the form of an order of specific performance. And that harm plainly outweighs the harm to EGI from a brief delay.

Accordingly, given this Court's continued and strong interest in enforcing arbitration agreements under the FAA, particularly in the context of international arbitration, it is reasonably likely at least four Justices will vote to review this question, and that this Court will reverse the decision. Mr. Coderch respectfully requests that this Court stay proceedings in the district court pending its disposition of his forthcoming petition for certiorari.

STATEMENT

A. Background

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA is the Act's "primary substantive provision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It guarantees that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). The operative enforcement provision, § 2, requires courts to "place[] arbitration agreements on an equal footing with other contracts[] and . . . enforce them according to their terms." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63,67 (2010). This Court has stated "on numerous occasions that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 559 U.S. at 682 (citations, internal quotation marks omitted).

Chapter 3 of the FAA enforces the Panama Convention. 9 U.S.C. § 301. It also incorporates several provisions from Chapter 2, which enforces the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997 (Dec. 29, 1970). *See* 9 U.S.C. § 302.

Courts treat the Panama and New York conventions as "substantively identical." *E.g.*, *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007). Chapter 3's residual clause provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter." 9 U.S.C. § 307. As Justice Thomas recently explained with respect to the New York Convention, the provisions of the treaty "contemplate the use of domestic doctrines to fill gaps in the Convention." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020). The FAA's emphatic command in Chapter 1 to enforce arbitration agreements as written is therefore preserved in the New York and Panama Conventions. The common goal is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

B. Facts and Procedural History

Viña San Rafael is among the twenty largest wine exporters in Chile. C.A. App. May 31, 2018 tr. 15:7-10. In 2005, EGI acquired 4,240,000 preferred shares in the company and later obtained about 3 million more shares, giving EGI about a 20% ownership stake. C.A. App. Doc 1 at 3. EGI paid in pesos the equivalent of about $17 million U.S. dollars and signed a Shareholders' Agreement. C.A. App. Doc 1-3. A group of eight Controlling Shareholders also signed that agreement, together

with two guarantors of the Controlling Shareholders' "obligations and liabilities." Juan Coderch was one of the guarantors. *Id*.

Section 10 of the Shareholders' Agreement gave EGI a "Put Right" if certain events occurred. *Id*. 8-9. On October 13, 2009, EGI claimed some events had occurred and sought to exercise the put right for all its shares. EGI has never revoked the claimed put right. App., *infra*, 3a n.2, 5a. Mr. Coderch and the other Controlling Shareholders contested EGI's claim and instituted an arbitration in Santiago, Chile. C.A. App. Doc 1-5 at 2. The Shareholders' Agreement made arbitration mandatory: "Any difficulty or controversy arising among the parties with respect to the application, interpretation, duration, validity or execution of this agreement shall be submitted to Arbitration pursuant to the UNCITRAL rules, contemplated in Law 19,971 on International Commercial Arbitration Law. The Arbitration will be held in Santiago, Chile." C.A. App. Doc 1-3 at 11. A choice of law clause provides, "THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAW OF CHILE." *Id*.

In the arbitration, EGI sought a declaration that it was entitled to the put right and that as a consequence, "each and every one" of the Controlling Shareholders and guarantors were "obligated to buy and pay EGI [] for all their shares in VSR at the price agreed to in Section 10 of the Shareholders' Agreement." *Id*. at 25-26. Section 10 specifies that "the per share purchase price, payable in cash to holders of the Preferred Stock, shall be equal to one hundred and three percent (103%) of the per share Preferred Liquidation Preference…." *Id*. at 9. The "Preferred

Liquidation Preference," in turn, is defined as the "Preferred Purchase Price"—the "purchase price per share paid by" EGI—"plus 4% per annum thereon (based on a 360-day year), compounded semi-annually accruing from and after the date of the Preferred Closing" (i.e., the date EGI paid for its shares). *Id*. at 12.

The arbitration lasted two years. On January 13, 2012, the arbitrator ruled that EGI was entitled to the put right and ordered "each and every one of the respondents … to buy and pay for all the shares of the claimant, EGI-VSR, L.L.C., in the company Viña San Rafael SA in the way requested in the claim." *Id*. at 103. The Award provides that the purchase transaction,

> must be carried out at the price agreed to in Section 10 of the Shareholder's Agreement of Viña San Rafael S.A., that is to say:
>
> a) The sum of 4,240,000 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF[1] 0.0782354, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from October 19, 2005.
>
> b) The sum of 42,768 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e. UF 0.07366925, plus 4% a year (based on a year of 360 days), compound semi-annually, starting from August 2, 2006.
>
> c) The sum of 748,435 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.060019, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from January 31, 2007.

[1] "UF" refers to the Unidad de Fomento, the Chilean inflation index.

> d) The quantity of 620,508 shares of preferred stock must be brought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.0600191, plus 4% a year (based on a year of 360 days), compounded semiannually, starting from October 11, 2007.
>
> e) The sum of 1,892,738 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.03892127, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from August 26, 2008.

Id. at 103-04 (emphasis added). The award did not perform any of the calculations or reduce the order to purchase shares to any specific price, nor did EGI ask the arbitrator to fix any specific purchase price. App., *infra*, 17a.

Chapter 3 of the FAA allows three years to petition to confirm an arbitration award. 9 U.S.C. §§ 207 and 302. The day before the three-year deadline, EGI filed a petition in the United States District Court for the Southern District of Florida to confirm the award under Chapter 3 solely against Mr. Coderch. C.A. App. Doc 1. EGI included as part of its petition its own calculations of the purchase price in U.S. dollars, totaling about $28 million. *Id*. at 12-13.

Mr. Coderch moved to dismiss the case. C.A. App. Doc 21. Mr. Coderch objected to EGI's calculations of the purchase price, claiming they were grossly inflated and inconsistent with the formula in the award and Shareholders' Agreement. These objections, he argued, were arbitrable under the arbitration agreement, and he asked the district court to remand the disputes to arbitration in Chile. *Id*. at 19-20; C.A. App. Doc 32 at 10. He further maintained the award could

not be confirmed as nonfinal and, even if the award's finding of entitlement to the put right could be confirmed, the district court could not under any circumstances perform the calculations and enter judgment on the purchase price. *Id*.; C.A. App. May 31, 2018 tr. at 18:14-19:2.

The district court confirmed the Award and denied Mr. Coderch's motion to dismiss. App., *infra*, 26a. The district court concluded EGI's calculations were correct and entered a final judgment in U.S. dollars in the amount EGI had calculated, $28,700,450.07, plus interest under 28 U.S.C. § 1961. *Id*. at 37a. The judgment did not require EGI actually to deliver any shares. *Id*. Mr. Coderch timely appealed.

On June 15, 2020, the Eleventh Circuit affirmed the district court's confirmation of the arbitration award but vacated the order and judgment for miscalculating the purchase price and entering a money judgment. *Id*. at 25a. The court of appeals agreed with Mr. Coderch that the district court's order improperly converted the Award from one of specific performance into a money judgment and had miscalculated the purchase price. *Id*. at 22a. It disagreed that any issues remained to be arbitrated, however. *Id*. at 19a. The Court found that the Award had done everything but perform the calculations. While acknowledging the disputes about how actually to do the calculations, the Eleventh Circuit determined the district court was free to resolve them itself. The Award had not specified a currency for the put price to be paid, but the Eleventh Circuit determined that the currency "does not matter so much…as long as the right conversion date is used."

Id. at 18a. The Award did not specify a conversion date either, but the Eleventh Circuit decided that the district court could apply U.S. law to determine that date. *Id*. at 21a. Though Chilean law controlled under the arbitration agreement, the Eleventh Circuit reasoned that the district court could apply the law of the United States since the petition had been filed under American law, the FAA. *Id*. at 20-21a. Applying the United States's "breach day" rule, the court of appeals decided the proper date of conversion was the day the award was issued and not the date payment was due, as the district court found. *Id*. at 21a. The Eleventh Circuit therefore vacated the judgment with instructions to the district court to re-calculate the put right price using the date of the Award as the conversion date, and to enter a judgement of specific performance. *Id*. at 25a.

Mr. Coderch moved the Eleventh Circuit to stay the mandate pending the filing of a petition for a writ of certiorari under Federal Rule of Appellate Procedure 41. *Id*. at 38a. The Eleventh Circuit denied the motion on July 30, 2020. *Id*. at 38a. Immediately upon issuance of the mandate, EGI moved for entry of judgment and submitted to the district court a new proposed judgment and recalculation of the purchase price, in the amount of $28,051,296.33. The district court extended the deadline to respond to EGI's motion until September 21, 2020.

ARGUMENT

Under 28 U.S.C. § 2101(f), this Court may stay proceedings in the district court pending the disposition of Mr. Coderch's forthcoming petition for a writ of certiorari. In reviewing such a stay application, this Court considers whether there is (1) "a reasonable probability that certiorari will be granted," (2) "a significant

possibility that the judgment below will be reversed," and (3) "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the [proceedings are] not stayed." *Barnes v. E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); *see also Deaver v. U.S.*, 483 U.S. 1301, 1302 (1987). "In close cases," the Court will further "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*).

This case satisfies each requirement. The court of appeals erroneously decided an important question of law affecting international arbitration in conflict with the FAA and this Court's repeated statements on the enforcement of arbitration agreements. This case is an optimal vehicle for review. If proceedings in the district court are not stayed, Mr. Coderch will lose his bargained-for right to arbitration and suffer irreparable harm. And the balance of the equities weighs strongly in his favor. The application for a stay should be granted.

I. A reasonable probability exists that this Court will grant certiorari.

This Court frequently grants certiorari in cases involving the FAA, often to underscore the emphatic federal policy that "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citation omitted); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Concepcion*, 563 U.S. at 339; *Rent-A-Ctr.,* 561 U.S. at 68. The rigorous enforcement of arbitration agreements thus remains a critical part of the

United States legal system, and this Court has granted review of cases that have challenged or undermined these principles term after term.

A. This case raises a vitally important issue concerning international arbitration.

The policy of promoting the FAA's stated purpose of enforcing arbitration agreements has particular importance in international arbitration. Just last term, this Court unanimously reversed an Eleventh Circuit decision that held nonsignatories could not be compelled to arbitration under Chapter 2 of the FAA, which incorporates the New York Convention. *GE Energy*, 140 S. Ct. at 1648. Nonsignatories traditionally may be compelled to arbitrate under Chapter 1 of the FAA, Justice Thomas reasoned in his unanimous opinion, and nothing in the New York Convention addressed and therefore could have conflicted with that domestic law. *Id*. at 1645. *GE Energy*'s pro-arbitration outcome underscores this Court's determined interest in ensuring enforcement of arbitration agreements, including if not *especially* ones controlled by international treaties.

In 2014, this Court decided an issue similar to the one presented in this case. *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014) reviewed the reversal of an order confirming an international arbitration award under the New York Convention. The D.C. Circuit in *BG Group* had conducted a *de novo* review of a "local litigation requirement" contained in an investment treaty between the United Kingdom and Argentina. The D.C. Circuit had decided for itself that the failure to comply with the requirement deprived the arbitrators of jurisdiction. *Id*. at 32. This Court granted certiorari to decide "who—court or arbitrator—bears primary

responsibility for interpreting and applying the local litigation requirement to an underlying controversy?" The Court concluded that "the matter is for the arbitrators, and courts must review their determinations with deference." *Id*. at 29. In granting the petition, this Court in *BG Group* specifically highlighted "the importance of the matter for international commercial arbitration." *Id*. at 32. The decision stressed that importance throughout. In rejecting the dissent's argument that treaties warrant "a different kind of analysis" than domestic agreements to arbitrate, this Court observed, "[t]hat is a matter of some concern in a world where foreign investment and related arbitration treaties increasingly matter." *Id*. at 42.

This case implicates the same matter of great importance. It involves international investment (in a Chilean wine company) and a related arbitration agreement and treaty (the Panama Convention). This case also raises the same essential issue—*who* decides, court or arbitrator, a particular dispute. To be sure, the Eleventh Circuit did not conduct *de novo* review of the arbitrator's calculations of the purchase price. The arbitrator did not perform any calculations at all. Doc 1-5 at 103-04. But the fact that the Eleventh Circuit decided the calculation disputes in the first instance, rather than in *de novo* review of the arbitrator's decision as in *BG Group*, is a distinction without a difference. If the calculation of the purchase price is an issue for the arbitrator to decide—a fact no party disputes—the court of appeals should not have delved into the merits under any circumstances.

B. The decision below directly conflicts with decisions of this Court.

The consistent theme in *GE Energy* and *BG Group* is that the same emphatically pro-arbitration policies underlying domestic arbitration agreements under Chapter 1 of the FAA govern international arbitration. And under Chapter 1, this Court has on multiple occasions policed the boundary between what issues arbitrators must decide and those a court may decide. When it comes to merits issues, questions of procedure, and other matters unmistakably designated to the arbitrator, court intrusion on the arbitrator's territory is strictly forbidden. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (recognizing "a court may not rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator, even if it appears to the court to be frivolous.") (internal quotes omitted) (citing *AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649–650 (1986) (holding a court has "'no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.") (internal quotes omitted) (quoting *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568 (1960)).

The decision in this case directly conflicts with these decisions. Holding the district court may apply U.S. law to decide substantive questions over the purchase price of shares under the put right thwarts the parties' arbitration agreement in two ways. Most directly it deprives Mr. Coderch of his ability to arbitrate disputes over the purchase price under the Shareholders' Agreement. And it substitutes U.S.

law for determining that price in place of Chilean law, as the parties agreed, *see* C.A. App. Doc. 1-3 at ¶ 18. This case thus creates an exception to the rule against courts deciding merits questions under the FAA, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 275 (1995).

C. The decision below conflicts with other courts of appeals.

The decision below also conflicts with other circuit decisions. The FAA requires the court to vacate an arbitrator's award "where the arbitrators ... so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). An incomplete arbitration award, which leaves substantial, arbitrable issues undecided, or that is "so badly drafted that the party against whom the award runs doesn't know how to comply with it," is therefore generally non-confirmable under the FAA. *Smart v. Int'l Broth. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002); *see Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 717–18 (6th Cir. 2014) (holding the FAA "preclude[s] the interlocutory review of arbitration proceedings and decisions").

To be sure, the failure to reduce an award to a specific remedy does not alone exclude confirmation of an award. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court found that an arbitrator's award requiring reinstatement of employees with back pay "minus pay for a 10-day suspension and such sums as these employees received from other employment,"

was not rendered unenforceable for failure "to specify the amounts to be deducted from the back pay." *Id*. at 595–96, 598. On the other hand, the Sixth Circuit's decision in *Savers Property* held that an arbitration panel's order to pay only those damages "capable of immediate calculation," while retaining jurisdiction to calculate other damages, resulted in an "interim award resolving only the matter of liability" and barred the district court from prematurely interfering in the arbitration. *Savers Property*, 748 F.3d at 718-19. In a different context, the Ninth Circuit held, in *Sunshine Mining Co. v. United Steelworkers of America, AFL-CIO, CLC*, 823 F.2d 1289 (9th Cir. 1987), that an arbitrator's finding of insubordination was incomplete when the arbitrator ordered a psychiatric examination, which never took place, to determine an ultimate question of whether the company had "just cause" to terminate an employee. *Id*. at 1295.

But even those courts that confirmed awards in disputes where arbitrable issues remained did so on the understanding that they were *partial* awards. *See Smart*, 315 F.3d at 726 (finding an award only on liability may leave "thorny remedial issues for future determination."); *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 20 (1st Cir. 2001) (deeming the arbitrator's award on liability "final" for purposes of confirmation but still a partial award). These decisions did not take the extraordinary step the Eleventh Circuit took here, of both confirming the award *and* deciding the arbitrable dispute itself. In *Enterprise*, for example, this Court reversed the part of the Fourth Circuit's decision that found the award unenforceable, but not the conclusion that the judgment had to be "modified

so that the amounts due the employees may be definitely *determined by arbitration*." *Enterprise*, 363 U.S. at 599 (emphasis added). And the Ninth Circuit's decision in *Sunshine* reversed the district court for doing exactly what the Eleventh Circuit authorized here—"substituting its interpretation for that of the arbitrator" when arbitrable issues remained for decision. In *Sunshine* the district court took the arbitrator's determination of insubordination as grounds for denying a terminated employee's grievance outright, though the arbitrator had made no final determination of "just cause" for the termination. In reversing the district court for resolving the dispute on its own, the Ninth Circuit found it "firmly established that the courts may resubmit an existing arbitration award to the original arbitrator for interpretation or amplification." *See Sunshine*, 823 F.2d at 1295. That decision stands in direct conflict with the Eleventh Circuit's decision here, where unresolved arbitrable issues of amount from a foreign arbitration *could* be decided by the district court under U.S. law.

The decision below creates an entirely new precedent, where the FAA's foundational command for courts to enforce arbitration agreements may be excused when the court is able to resolve the dispute itself. Vacating the district court's order for having miscalculated the purchase price and remanding for a recalculation *by the district court*, conflicts with the Ninth Circuit's decision in *Sunshine* and countless other decisions from courts of appeals and this Court that have not taken that extraordinary step. Accordingly, Mr. Coderch will present a substantial circuit conflict on the question in his petition for certiorari.

D. This case is an ideal vehicle for this Court's review.

The question to be presented in this case is straightforward and unburdened by factual disputes. It is a purely legal question concerning whether the rule against court determination of merits issues may be relaxed when a party seeks confirmation of an award, but the arbitrator has left material disputes unresolved. There is no question about the scope of the arbitration agreement or its enforceability. EGI concedes that disputes over the purchase price of the relevant shares are arbitrable under the agreement. EGI br. at 31, No. 18-12615 (11th Cir. Nov. 13, 2018). The question presented is also unclouded by factual disputes. Indeed, the factual issues are the very ones Mr. Coderch maintains must be decided by the arbitrator and not the court. The Eleventh Circuit's decision in vacating the district court for miscalculations under the American "breach day" rule precludes any contention that the arbitrator left open only a "mechanical" or "ministerial" calculation. The array of unknown and undecided variables in the award substantially impacts the purchase price. Questions about what currency to use, what conversion date to apply, the computation of compounded interest in relation to EGI's election of the put right, and what law to apply, were all discussed or alluded to in the decision below, if not decided. *See* App., *infra*, 3a-6a, 16a-21a. The Eleventh Circuit remanded to the district court for further litigation over the ultimate purchase price. But an arbitrator, bound to apply Chilean law, would almost certainly reach a different result than the district court applying American law.

The issue is also likely to recur. Allowing U.S. court determination of leftover merits issues from international arbitrations encourages parties to seek confirmation of partial or incomplete awards in federal courts under the FAA, with the full benefits and remedies of U.S. law at their disposal. Such a result would defeat the goals of international arbitration and the Panama Convention, "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced...." *Scherk*, 417 U.S. at 520. These issues are, as *BG Group* emphasized, vitally important, as they arise from international investment and arbitration. *BG Group*, 572 U.S. at 32, 42. This Court has to date authorized no exception to the enforcement of arbitration agreements when arbitrability is uncontested, even when the arguments are frivolous. *Henry Schein*, 139 S. Ct. at 529. Accordingly, a reasonable probability exists that at least four Justices would vote to grant certiorari.

II. There is a significant possibility this Court will reverse the court of appeals' decision.

There is a significant possibility—indeed, a high likelihood—that this Court will reverse the court of appeals' decision. This Court has repeatedly instructed lower courts to enforce arbitration agreements according to their terms. *See, e.g., Italian Colors*, 570 U.S. at 233; *CompuCredit*, 565 U.S.at 98; *Concepcion*, 563 U.S. at 339; *Rent-A-Center*, 561 U.S. at 67. The court of appeals ignored that emphatic instruction and instead held that courts may decide final remedies when the arbitrator failed to do so. That is reversible error. *See id*.

Other errors pervade the opinion. The Eleventh Circuit decided U.S. law can answer specific questions about conversion dates and currency since the petition arose under the FAA, despite the agreement's express choice of Chilean law. App., *infra*, 20a-21a. The central purpose of the FAA is to enforce arbitration agreements. Parties may agree on any procedure they wish, including what law to apply. *See Stolt-Nielsen*, 559 U.S. at 683 (reaffirming that "parties are generally free to structure their arbitration agreements as they see fit … and may agree on rules under which any arbitration will proceed") (citations, internal quotations omitted). Courts have no discretion to nullify an agreement to apply Chilean law to the purchase price of shares, or to calculate the price under their own preferred choice of law. *Id*. at 682 ("courts and arbitrators must give effect to the contractual rights and expectations of the parties.") (citations, internal quotations omitted).

And though EGI's petition arose under federal law, Chapter 3 of the FAA, that law *adopts* the Panama Convention, not the other way around. *See* 9 U.S.C. § 301 ("The Inter-American Convention on International Commercial Arbitration of January 30, 1975, *shall be enforced* in United States courts in accordance with this chapter.") (emphasis added). The Panama Convention provides that an award's "*execution or recognition*" may be ordered "in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties." Inter-Am. Convention on Int'l Commercial Arbitration, Art. IV, 1978 WL 219648 *6 (emphasis added). But a substantive decision on the final purchase price of a put right is hardly a question of "execution or recognition"—it is an integral

part of the put right dispute, which the parties indisputably agreed to arbitrate under the law of Chile. Merely filing a petition under the FAA does not open the door to courts applying American law to resolve arbitrable disputes when the parties specifically agreed to arbitrate under a different law. *See Henry Schein*, 139 S. Ct. at 529.

Implicit in the Eleventh Circuit's decision is the desire to bring a lengthy dispute to a close. Undoubtedly efficiency and expedience are goals of the FAA. But that is not a basis for a court to take the reins of an arbitrable dispute. As this Court has recognized, efficiency may be *a* goal of the FAA, but the "overriding goal" of the FAA is to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219 (1985) (rejecting the contention that the FAA's "overriding goal" of the Arbitration Act was to "promote the expeditious resolution of claims"). When those two goals are in conflict, this Court has promoted the unflagging obligation of courts to enforce arbitration agreements, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (quoting *Dean Witter*, 470 U.S. at 218). As this Court held in *Dean Witter*, "[w]e therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters."). *Dean Witter*, 470 U.S. at

221. In this case, the Eleventh Circuit erroneously elevated expedience over enforcement of the arbitration agreement.

This is not to suggest blame for the long unresolved dispute over amount lies with Mr. Coderch. To the contrary, EGI waited the maximum three years before seeking confirmation under Chapter 3. App., *infra*, 5a-6a. Only then for the first time did EGI present its purchase price (the calculations would come even later), as an attachment to its Petition. *Id.* at 7a n.6. Another two years passed as EGI attempted to serve Mr. Coderch, who resides in South America, during which time the district court closed the case. *Id.* at 6a-10a. Mr. Coderch then promptly moved to dismiss claiming the calculations were a matter for the arbitrator to decide. *Id.* at 10a. The parties spent two years litigating that demand. *Id.* That was no basis for the Eleventh Circuit to put the matter to bed. It was, rather, another element of the lower courts' error. *Moses H. Cone*, 460 U.S. at 23 (finding delay caused by a district court stay order "frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements.").

Accordingly, there is a strong likelihood this Court would uphold these principles in this case and reverse the Eleventh Circuit's decision.

III. Absent a stay, Mr. Coderch will suffer irreparable harm.

The mandate will require Mr. Coderch to litigate the purchase price of the put right on remand in the district court. But it is an issue he has from the very beginning maintained must be determined by an arbitrator in Chile, under Chilean law, and not by a federal judge in Miami. Without a stay, Mr. Coderch will be

denied his contractual right to arbitrate. Circuit court decisions recognize that the deprivation of a bargained-for right to arbitration cannot be fully remedied by an eventual order compelling arbitration. *See, e.g., Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214 (3d Cir. 2007) (holding "vindication of the litigant's contractual right to arbitrate would come only after he had been forced to expend substantial time and expense fully litigating the matter in court, which is precisely what he sought to avoid in the first place by bargaining for the speedy and efficient dispute resolution procedure that the arbitral forum offers"); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1253 (11th Cir. 2004) ("[w]hen a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is nonfrivolous."); *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (finding "the parties' preference for non-judicial dispute resolution … are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially.") (Easterbrook, J.); *Lummus Co. v. Commonwealth Oil Refining Co.,* 273 F.2d 613, 613 (1st Cir. 1959) (agreeing that "a court order of discovery would be affirmatively inimical to appellee's obligation to arbitrate, if this court determines it to have such obligation."). As these decisions recognize, the principal advantages of bilateral arbitration, to "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve

specialized disputes," *Concepcion*, 563 U.S. at 348 (citation omitted)—are lost forever if parties are forced to go through district court litigation and appeals in spite of a proper demand to arbitrate.

Congress has implicitly recognized the irreparable nature of the harm Mr. Coderch faces by authorizing immediate appeals from a district court decision that "refus[es] a stay of any action under section 3" of the FAA, "den[ies] a petition under section 4 of [the FAA] to order arbitration to proceed," or "den[ies] an application under section 206 [of the FAA] to compel arbitration," while prohibiting appeals from orders granting motions to compel arbitration. 9 U.S.C. § 16(a)(1)(A)-(C). That asymmetrical regime exists to "avoid[] the possibility that a litigant seeking to invoke his arbitration rights will have to endur[e] a full trial on the underlying controversy before [he] can receive a definitive ruling on whether [he] was legally obligated to participate in such a trial in the first instance." *See Ehleiter*, 482 F.3d at 214 (internal quotation marks and citation omitted; alteration in original). Mr. Coderch will suffer precisely that harm if proceedings in the district court go forward without a stay.

IV. The equities favor a stay.

The harm to EGI, in contrast, would be minimal. EGI has had two years to collect on the original money judgment, which the decision below vacates. In that time, EGI has instigated substantial litigation that has included garnishment proceedings in multiple states and a Supplemental Complaint, and obtained wide ranging discovery in aid of execution against Mr. Coderch and other unrelated

entities. The fruits of that information-gathering cannot be undone now. A five or six month stay pending a decision on his petition for a writ of certiorari would cost EGI nothing.

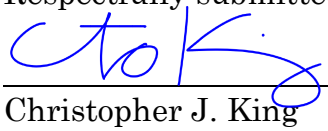
Public policy, moreover, strongly favors arbitration. *E.g., Cocchi*, 565 U.S. at 21. It is contrary to that public policy to require the parties to burden the district court and public by continuing to litigate the merits of this dispute, including protracted litigation over the amount, the form of the judgment, and compliance, while this Court decides an ultimate question of arbitrability. And if this case proceeds without a stay, the district court's and the parties' resources will be wasted by litigating a matter that will ultimately be resolved by the arbitrator if and when the court of appeals' judgment is reversed and the case is sent to arbitration. Accordingly, a stay is appropriate.

CONCLUSION

The Court should grant this application for a stay of proceedings pending a petition for a writ of certiorari.

September 2, 2020.

Respectfully submitted,



Christopher J. King
Counsel of record
Kevin P. Jacobs
Peter W. Homer
HOMER BONNER JACOBS ORTIZ, P.A.
1200 Four Seasons Tower
1441 Brickell Avenue
Miami Florida 33131
(305) 350-5192
cking@homerbonner.com

Counsel for Applicant

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Appendix A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12615

D.C. Docket No. 1:15-cv-20098-RNS

EGI-VSR, LLC,

Petitioner – Appellee,

versus

JUAN CARLOS CELESTINO CODERCH MITJANS,

Respondent – Appellant.

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

(June 25, 2020)

Before ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY,* District Judge.

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* Honorable William H. Pauley, III, Senior United States District Judge, Southern District of New York, sitting by designation.

TJOFLAT, Circuit Judge:

Juan Carlos Celestino Coderch Mitjans ("Mr. Coderch") appeals the District Court's order confirming a $28 million international arbitration award in favor of EGI-VSR, LLC ("EGI"). In 2012, a Chilean arbitrator resolved a dispute between EGI and Mr. Coderch arising out of a Shareholders' Agreement that was designed to protect EGI's investment in a Chilean wine company. Specifically, the arbitrator enforced a provision of the Shareholders' Agreement which gave EGI the right to sell its shares back to the controlling shareholders, including Mr. Coderch, at a premium if any of the controlling shareholders breached certain promises made to EGI in the Agreement. The arbitrator found that the controlling shareholders breached the Agreement and ordered Mr. Coderch and the other controlling shareholders to pay for all of EGI's shares at the premium price specified in the Agreement.

EGI sought to enforce the Chilean award in the U.S. District Court for the Southern District of Florida by filing a petition to confirm the international arbitration award under the Federal Arbitration Act ("FAA"). Over Mr. Coderch's objections, the District Court confirmed the award as requested by EGI. Mr. Coderch raises two errors on appeal. First, he claims that he was not properly served in Brazil under Brazilian law. Second, he argues that the District Court should not have confirmed the award because (a) it was a non-final arbitration

award, and (b) EGI's requested relief substantially modified the award. We agree with the District Court that service was proper, and that this arbitration award should be confirmed. However, we vacate the District Court's order and remand with instructions to correct two errors that the Court committed in enforcing the award.

I.

On October 19, 2005, EGI purchased 4.24 million preferred shares in a Chilean wine company, Viña San Rafael S.A.[1] As part of that purchase, EGI entered into a written Shareholders' Agreement with the controlling shareholders of Viña San Rafael. Relevant here, the Shareholders' Agreement provides in Section 10 that if the controlling shareholders breach certain covenants in the Agreement, EGI would have a "put right," meaning that EGI could force the controlling shareholders to purchase from EGI all of EGI's shares of preferred stock.[2] Section 10 then fixes the price of those preferred shares at "one hundred and three percent (103%) of the per share Preferred Liquidation Preference." Shareholders' Agreement defines the "Preferred Liquidation Preference" as "a

[1] Over the next several years, EGI purchased millions of additional shares in Viña San Rafael, ultimately acquiring over 7.54 million shares—a nearly $20 million investment.

[2] EGI could "put" some or all of its shares, and retained full discretion "to revoke its exercised Put Right with respect to all or any part of the shares to be purchased anytime before such shares are effectively transferred and paid for and thereafter shall not be obligated to sell them."

liquidation preference in the amount of the Preferred Purchase Price per share, plus 4% per annum thereon (based on a 360-day year), compounded semi-annually accruing from and after the date of the Preferred Closing."[3] "Preferred Purchase Price" is in turn defined as "the purchase price per share paid by [EGI] for the shares of Preferred Stock acquired by them pursuant to the Preferred Purchase Agreement."[4] To make it simpler: the put price for EGI's preferred shares is equal to the original price EGI paid for those shares, plus an additional 4% per year (compounded semi-annually from the date that EGI purchased the shares), plus another 3% on top of that amount.

Additionally, under Section 11, Mr. Coderch agreed to "unconditionally and irrevocably guarantee[] the prompt payment when due and performance of the obligations and liabilities of" several of the controlling shareholder entities,

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[3] The "Preferred Closing" is "the date of the payment of the shares of Preferred Stock issued to [EGI]," or the "Payment Date."

[4] The Preferred Purchase Agreement is not included in the record on appeal, and the Shareholders' Agreement does not otherwise indicate the purchase price per share paid by EGI for its shares of preferred stock. But we know what EGI paid for these shares because the arbitrator listed the price in his ultimate award. According to the award, EGI purchased its initial 4.24 million shares of preferred stock at a price per share of UF 0.0782354. (UF is the Spanish acronym for *Unidad de Fomento*, an inflation-controlled unit of account used in Chile.)

Although the award does not walk through each of EGI's subsequent acquisitions of preferred stock, it does list the date and price of each of these purchases in its final calculation of the amount owed to EGI. Apparently, after this initial purchase of 4.24 million shares on October 19, 2005, EGI purchased an additional 42,768 shares of preferred stock on August 2, 2006 at a price per share of UF 0.07366925; 748,435 shares of preferred stock on January 31, 2007 at a price per share of UF 0.060019; 620,508 shares of preferred stock on October 11, 2007 at a price per share of UF 0.0600191; and 1,892,738 shares of preferred stock on August 26, 2008 at a price per share of UF 0.03892127. *See infra* p. 6.

including "the payment for shares of Preferred Stock purchased in connection with the exercise of the Put Right." The obligations and liabilities of the controlling shareholders under the Shareholders' Agreement are joint and several.

On October 13, 2009, EGI sought to exercise its put right, alleging several breaches of the Shareholders' Agreement by the controlling shareholders.[5] When the controlling shareholders—and Mr. Coderch, as guarantor for his companies—refused to pay for EGI's shares in accordance with Section 10, it triggered the arbitration clause of the Shareholders' Agreement, and a years-long arbitration ensued in Chile. Ultimately, on January 13, 2012, the Chilean arbitrator issued a 102-page Arbitration Award, finding that the controlling shareholders breached several sections of the Shareholders' Agreement, thus entitling EGI to exercise its put right. It ordered the controlling shareholders to purchase, within ten days, EGI's preferred shares at the price agreed to in Section 10 of the Shareholders' Agreement. It then laid out the method for calculating the purchase price with respect to each of EGI's separate acquisitions of preferred stock, tracking the language of Section 10 outlined above:

> This purchase transaction must be carried out at the price agreed to in Section 10 of the Shareholder's Agreement of Viña San Rafael S.A., that is to say:

[5] EGI elected to exercise its put right with respect to all of its shares, and it has never sought to revoke that put. *See supra* note 2.

a) The sum of 4,240,000 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.0782354, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from October 19, 2005.

b) The sum of 42,768 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.07366925, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from August 2, 2006.

c) The sum of 748,435 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.060019, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from January 31, 2007.

d) The quantity of 620,508 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.0600191, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from October 11, 2007.

e) The sum of 1,892,738 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.03892127, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from August 26, 2008.

EGI filed a petition to confirm the Arbitration Award against Mr. Coderch in the U.S. District Court for the Southern District of Florida on January 12, 2015. In its petition, EGI performed the calculations laid out in the Arbitration Award and

asked the District Court to direct Mr. Coderch to pay EGI $28,700,450.07.[6] The District Court issued a summons on March 30, 2015, and on April 20, 2015, EGI filed a notice indicating that it had filed a request to serve process on Mr. Coderch at his last known residence in Brazil pursuant to the Inter-American Convention on Letters Rogatory ("Convention on Letters Rogatory"), Jan. 30, 1975, O.A.S.T.S. No. 43, 1438 U.N.T.S. 288.

The Convention on Letters Rogatory facilitates the transmission of letters rogatory[7] among its signatory countries, including for procedural acts such as service of process. Under the Convention on Letters Rogatory and the Additional Protocol to the Inter-American Convention on Letters Rogatory ("Additional Protocol"), May 8, 1979, O.A.S.T.S. No. 56, 1438 U.N.T.S. 372, the originating country's Central Authority—established to carry out the country's responsibilities under the Convention on Letters Rogatory—transmits the letters rogatory to the destination country's Central Authority. The Central Authority in the destination country then executes the letters rogatory in accordance with its own laws and

[6] Although EGI included its calculations in an appendix to the petition, it did not specify in the petition itself the final dollar amount it believed Mr. Coderch was obligated to pay. EGI later filed a more detailed calculation and a proposed judgment that listed the final purchase price when it filed its response brief in opposition to Mr. Coderch's motions to quash and to dismiss.

[7] "In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act." 22 C.F.R. § 92.54.

procedural rules. Convention on Letters Rogatory, art. 10; Additional Protocol, art. 4. Upon execution, the Central Authority of the destination country certifies that the letters rogatory were executed in accordance with local law and returns the executed letters rogatory to the Central Authority in the originating country. Both the United States and Brazil are signatories to the Convention on Letters Rogatory and its Additional Protocol.

Because this process can take at least twelve months to complete, EGI moved, on May 7, 2015, for an extension of time to effectuate foreign service of process on Mr. Coderch pursuant to the Convention on Letters Rogatory. The District Court granted EGI's request and administratively closed the case until service was carried out.

Once Brazil's Central Authority received the Letter Rogatory from the United States, it attempted, unsuccessfully, to serve Mr. Coderch multiple times at various addresses; later it dispatched a bailiff, who apparently was unable to locate Mr. Coderch at his last known address. During the bailiff's latest attempt to serve Mr. Coderch on November 1, 2016, the bailiff was informed that Mr. Coderch was living at a *finca* (a farm) in Paraguay. On December 5, 2016, a Paraguayan notary attempted to locate the *finca* but could not find any record of it. So, EGI submitted a request to the Brazilian Superior Court of Justice ("STJ") to serve Mr. Coderch via a special procedure for constructive service under Brazilian law called *citação*

por hora certa ("*hora certa*"), which translates to "service of process at a designated time."

Under Articles 252 and 253 of the Brazilian Code of Civil Procedure, a Brazilian court may authorize *hora certa* service on an individual if service was attempted twice unsuccessfully and there is reason to suspect that the individual is concealing himself from service. Aff. of Pedro Oliveira da Costa, ¶¶ 11–12, nn.1–2, ECF No. 16-7; Decl. of Keith S. Rosenn, ¶¶ 19–20, ECF No. 21-3; Decl. of José Roberto dos Santos Bedaque, ¶¶ 10–12, ECF No. 30-2.[8] To accomplish *hora certa* service, a court official must attempt to serve the summons twice at the individual's address. da Costa Aff. ¶ 12. If he is still unsuccessful, he must notify a family member, neighbor, or doorman at that address that he will return on the next day at a designated time to attempt service a third time. *Id.* If the target of service still cannot be located at the address after this third attempt at service, the official may leave a copy of the summons and complaint with a family member, neighbor, or doorman, and the target is deemed constructively served under Brazilian law. *Id.* ¶¶ 12–15.

Here, the STJ specifically authorized *hora certa* service on Mr. Coderch. The bailiff returned to Mr. Coderch's Brazilian apartment on April 6 and 11, 2017,

[8] "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

to attempt service. After both attempts were unsuccessful, he notified the doorman that he would attempt service one final time on April 12, 2017, at 2:00 p.m. The bailiff returned on April 12 but again could not find Mr. Coderch. The bailiff thus left the summons and copies of the court documents with the doorman. On May 11, 2017, the STJ confirmed that Mr. Coderch had been properly served via the *hora certa* process, and on June 8, 2017, the Brazilian Ministry of Justice and Public Security returned the Letter Rogatory to the United States, indicating that Mr. Coderch had been validly served under Brazilian law.

After the Letter Rogatory was returned and filed with the District Court, the District Court reopened the case. Mr. Coderch moved to quash the foreign service of process under Rule 12(b)(4) of the Federal Rules of Civil Procedure, claiming that service was invalid under Brazilian law. He also moved to dismiss the petition to confirm the Arbitration Award, arguing, *inter alia*, that the Award cannot be recognized because it is not a money judgment and that recognition of the Award as requested by EGI would substantially modify the Award. The District Court denied both motions. It first held that it could not review the Brazilian court's determination that service of process had been carried out in accordance with Brazilian law; but even if it could, it found that Mr. Coderch had not presented persuasive evidence that service was insufficient. The Court then held that the

Award should be confirmed, rejecting each of Mr. Coderch's arguments. Mr. Coderch now appeals.

II.

We turn first to the sufficiency of service of process in Brazil. When reviewing an order resolving a defendant's challenge to service of process, we review the district court's legal conclusions, including the district court's interpretation of foreign law in determining the sufficiency of service, *de novo* and its findings of fact for clear error. *Prewitt Enters., Inc. v. Org. of Petroleum Exp. Countries*, 353 F.3d 916, 920–21 (11th Cir. 2003).

In this case, EGI chose to serve Mr. Coderch pursuant to the Convention on Letters Rogatory and its Additional Protocol. Under the Convention on Letters Rogatory, "[l]etters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination," here, Brazil. Convention on Letters Rogatory, art. 10. The Convention on Letters Rogatory further provides that "the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory." Convention on Letters Rogatory, art. 11. Here, a Brazilian court determined both that service via the *hora certa* procedure was warranted and that *hora certa* service had been carried out in accordance with Brazilian law. The District Court determined that it would be improper for the Court to review a decision by the Brazilian court that

service of process was carried out in accordance with Brazilian law. We also see no reason to disturb the Brazilian court's rulings. Principles of comity[9] counsel against reviewing a foreign court's determination regarding the interpretation and application of the foreign country's own laws—especially here, where the operative treaty confers jurisdiction over the issue to the foreign court.

In evaluating whether comity is appropriate, we consider "(1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just." *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994) (internal citations omitted). We also consider "whether 'the central issue in

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[9] International comity refers to "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 143 (1895); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014). As the Supreme Court has explained:

> When . . . [a] foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Hilton, 159 U.S. at 205–06, 16 S. Ct. at 159–60.

dispute is a matter of foreign law and whether there is a prospect of conflicting judgments.'" *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1258 (11th Cir. 2006) (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)).

Mr. Coderch argues that the Brazilian STJ's decision to authorize *hora certa* service is not entitled to comity because (1) it was the product of an ex parte proceeding in which he had no opportunity to defend himself, and (2) it was procured by fraud. As to his first argument, Mr. Coderch claims that he lacked any fair opportunity to defend himself in the Brazilian court because, if he had appeared to challenge service or the *hora certa* procedure, he would have been automatically deemed served under Brazilian law. Thus, he could not have challenged service in the Brazilian courts, like the District Court suggested, because to challenge service in Brazil would have been to waive service.

It is true that if Mr. Coderch had attempted to challenge service in Brazil, he would be deemed served under Brazilian law upon appearing in court. But that is why, in cases dealing with constructive service such as the *hora certa* service at issue here, Brazilian law provides for the appointment of a lawyer from the Public Defender's Office to represent the interests of the individual who has not yet appeared before the Brazilian court. da Costa Aff. ¶ 11, n.4, ECF No. 30-1. In this case, a Special Guardian from the Public Defender's Office represented Mr.

Coderch in defending against service in the Brazilian tribunal. That Public Defender apparently made multiple challenges to the validity of service in the Brazilian court on Mr. Coderch's behalf, a fact Mr. Coderch does not dispute. As such, we cannot say that the Brazilian tribunal failed to offer Mr. Coderch a fair opportunity to defend against service in Brazil.

With respect to his second argument, Mr. Coderch contends that the evidence submitted to the STJ, which the STJ relied on in finding that Mr. Coderch was concealing himself from service and authorizing *hora certa* service, was false. Specifically, Mr. Coderch claims that the declaration presented to the STJ that stated that his *finca* in Paraguay did not exist was false and misled the STJ, and thus that the STJ's factual determination that Mr. Coderch was attempting to evade service was erroneous and, as a matter of Brazilian law, it should not have authorized *hora certa* service. The District Court, however, found no evidence of fraud, instead concluding that "ample evidence" substantiated the STJ's finding that Mr. Coderch was evading service of process. The District Court did not clearly err in so finding, and we are not convinced that EGI's (and the Paraguayan notary's) apparent inability to locate Mr. Coderch's *finca* in Paraguay rises to the level of fraud.

Accordingly, we hold that the District Court did not err in finding that considerations of international comity counseled against reviewing the Brazilian

court's determination that Mr. Coderch had been properly served in accordance with Brazilian law, especially since the Convention on Letters Rogatory commits jurisdiction of this issue to the courts of Brazil. Therefore, the District Court properly denied Mr. Coderch's motion to quash service under Rule 12.

III.

We turn next to Mr. Coderch's argument that the District Court erred in confirming the Arbitration Award. "On an appeal of a district court's decision to confirm or vacate an arbitration award, we review the district court's resolution of questions of law de novo and its findings of fact for clear error." *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1258 (11th Cir. 2007).

Both parties agree that this Arbitration Award is governed by the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245. Chapter 3 of the FAA, 9 U.S.C. §§ 301–307, implements the Panama Convention. Relevant here, § 302 incorporates by reference § 207 of the FAA, which provides that a federal court *must* confirm an arbitration award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[10] 9 U.S.C. § 207. Article 5 of the Panama Convention lists

[10] The "said Convention" referred to in § 207 is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, the predecessor to the Panama Convention. There is

seven grounds for refusing to recognize an arbitration award: (1) incapacity or invalidity of the agreement, (2) lack of notice, (3) that the decision concerns a non-arbitrable dispute, (4) violation of the arbitration agreement or relevant law in carrying out the arbitration, (5) "[t]hat the decision is not yet binding on the parties or has been annulled or suspended," (6) "[t]hat the subject of the dispute cannot be settled by arbitration under the law of [the State of recognition]," and (7) "[t]hat the recognition or execution of the decision would be contrary to the public policy (*ordre public*) of [the State of recognition]." Panama Convention, art. 5. Mr. Coderch does not claim to be invoking one of these exceptions as a basis for refusing to confirm the Arbitration Award.

Instead, Mr. Coderch argues that the Award was not confirmable for two reasons. First, he argues that the Award left undecided several issues relating to the purchase price that render the Award non-final. And, he says, although the Panama Convention is silent on whether non-final awards may be confirmed, as a general matter we lack jurisdiction to confirm a non-final arbitration award. *See Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 748 F.3d 708, 717–19 (6th Cir. 2014) (holding that the court lacked jurisdiction to review an interim award that resolved only issues of liability and reserved for a later date the

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no substantive difference between the two as relevant here. Moreover, in incorporating § 207 into Chapter 3 of the FAA, § 302 specifies that "the Convention" shall mean the Panama Convention for purposes of Chapter 3.

question of computing damages). He asks us to send the dispute back to the arbitrator to decide these issues in the first instance. Second, he argues that confirming the Award as requested by EGI improperly modifies the Award from an order of specific performance to an award for money damages. We review each argument in turn.

A.

Coderch first argues that the Award cannot be confirmed because it did not fully resolve the parties' disputes regarding the purchase price. As explained above, the Arbitration Award provides a detailed formula, tracking precisely the language of Section 10 of the Shareholders' Agreement, for calculating the price of the shares that EGI was entitled to sell pursuant to its put right, based on the initial Preferred Purchase Price per share identified in the Award. The only thing the Arbitration Award does not do is perform the calculations. Despite this, Mr. Coderch claims that the Award is non-final because the formula fails to specify the currency in which the purchase is to be made—it provides as a starting point for the calculation a sum in UF, which is not a currency but an inflation index, and fails to specify a conversion date for purposes of converting the UF figures into an appropriate currency. He argues that EGI improperly calculated the amount owed to it under the Award by converting the UF amount listed in the Award to U.S. dollars, as opposed to Chilean pesos as the Shareholders' Agreement contemplates.

He claims that we must remand this dispute so that the arbitrator can decide the appropriate currency.

As an initial matter, we can find nothing in the Shareholders' Agreement that requires the shares purchased pursuant to the put right to be paid for only in Chilean pesos, as Mr. Coderch claims. The Arbitration Award certainly does not require as much, given that it directs the purchase price to be calculated in terms of UF. But regardless, EGI *did* initially convert the UF figure listed in the Award to Chilean pesos, before eventually converting it into U.S. dollars for purposes of confirmation in the District Court.

Moreover, the currency in which the Award is ultimately paid does not matter so much—as far as value goes—as long as the appropriate conversion date is used. That brings us to the parties' next disagreement. EGI converted the Award amount from UF to pesos to U.S. dollars using the exchange rate on the date that payment was due under the Award: January 23, 2012.[11] EGI argues this was appropriate because, according to the "breach day" rule, foreign arbitration awards should be converted to U.S. dollars on the date of the award. Mr. Coderch

[11] The arbitrator rendered a decision on January 13, 2012, requiring Mr. Coderch to purchase all of EGI's shares within ten *business days* from the date of the Award. That means that performance under the Award was due on January 27, 2012. In arriving at the January 23 date, EGI apparently counted ten total days, including Saturdays and Sundays, from the date of the Award. Nonetheless, this mistake does not affect our conclusion because, as explained below, we find that the proper conversion date is in fact January 13, 2012.

argues that this gives EGI an inflated award, and that the appropriate conversion date is the date of the "Preferred Closing" in the Shareholders' Agreement. He also argues that because the Award itself does not provide the conversion date, the Award is non-final, and we should send the matter back to the arbitrator to decide in the first instance.

While the Arbitration Award does not specify a conversion date, that omission alone does not render the Award non-final if the conversion date is established as a matter of law. The Supreme Court has laid out two options for determining the proper date on which to convert foreign currency into U.S. dollars. The first, established in *Hicks v. Guinness*, 269 U.S. 71, 46 S. Ct. 46 (1925), and known as the "breach day" rule, applies when the plaintiff's cause of action arises under U.S. law. *See Jamaica Nutrition Holdings, Ltd. v. United Shipping Co.*, 643 F.2d 376, 380 (5th Cir. April 24, 1981).[12] In that case, the applicable exchange rate is the rate that was in effect on the date that the plaintiff's cause of action arose. *Id.* In *Hicks*, a breach-of-contract case, that meant that German marks should be converted into U.S. dollars on the date the contract was breached. *See* 269 U.S. at 80, 46 S. Ct. at 47. The Supreme Court reasoned that at the time of breach the plaintiff had a claim under U.S. law for damages in U.S. dollars.

[12] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding all Fifth Circuit precedent prior to October 1, 1981.

Jamaica Nutrition Holdings, 643 F.2d at 380 (quoting *Hicks*, 269 U.S. at 80, 46 S. Ct. at 47).

The second method, based on the Supreme Court's decision in *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S. Ct. 166 (1926), applies when the suit is based entirely on an obligation existing under a foreign country's laws and the debt is payable in that country's currency. *Jamaica Nutrition Holdings*, 643 F.2d at 380. In that case, the parties assume the risk of currency fluctuations and the applicable exchange rate is the rate in effect on the date of the final decree or judgment. *Humphrey*, 272 U.S. at 518–19, 47 S. Ct. at 166–67; *Jamaica Nutrition Holdings*, 643 F.2d at 380. This is known as the "judgment day" rule.

To determine which rule is applicable, we look to the jurisdiction in which the plaintiff's cause of action arose. *See In re Good Hope Chem. Corp.*, 747 F.2d 806, 811 (1st Cir. 1984). This is a suit under the FAA to confirm an international arbitration award. Thus, the FAA, which implements the Panama Convention, is the source of EGI's cause of action. While the underlying dispute between EGI and Mr. Coderch in arbitration regarding the breach of the Shareholders' Agreement was governed by Chilean law, EGI's cause of action here derives entirely from U.S. law, namely the right under the FAA to have an international arbitration award confirmed by a U.S. court. Therefore, because EGI's cause of

action arises under U.S. law, the District Court properly understood that the purchase price owed to EGI under the Award should be converted to U.S. dollars according to the breach day rule.

However, the District Court clearly erred in accepting the date suggested by EGI—January 23, 2012—as the appropriate date for conversion under the breach day rule. The breach day rule requires conversion using the exchange rate on the date that the cause of action arose. A cause of action arises under § 207 of the FAA as soon as an arbitration award "is made." *See* 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention *is made*, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." (emphasis added)); *see also Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993), *as amended* (May 25, 1993) (interpreting "made" in § 207 as referring to when the award is actually decided by the arbitrator, and thus finding that the three-year statute of limitations begins to run once the arbitration award is issued). In other words, an arbitration award becomes confirmable under the Panama Convention and the FAA as soon as it is issued. EGI thus had a cause of action under the FAA as soon as the Arbitration Award issued in Chile on January 13, 2012. As such, the proper conversion date under the breach day rule is January 13,

2012. The District Court therefore clearly erred in accepting EGI's calculations, which converted UF to pesos to U.S. dollars on January 23, 2012.

B.

Lastly, Mr. Coderch contends that the District Court should not have confirmed the Arbitration Award as requested by EGI because the Award was really an order of specific performance, forcing the controlling shareholders' compliance with Section 10 of the Shareholders' Agreement, and not an award of a sum of money. He argues that enforcing the Arbitration Award as a money judgment gives EGI a windfall, allowing EGI to collect an inflated purchase price without any obligation to turn over the shares.[13]

Mr. Coderch is correct that the Arbitration Award is properly understood as ordering specific performance of the parties' obligations under Section 10—namely, the purchase by Mr. Coderch and the sale by EGI of EGI's shares of preferred stock. As the arbitrator noted throughout the Award, EGI had sought forcible compliance with the terms of the Shareholders' Agreement. And Section 10 of the Shareholders' Agreement makes clear that the parties contemplated the simultaneous transfer of stock for cash by providing that "*[a]t the time of each one*

[13] Despite having exercised its put right, EGI continues to hold onto the shares. It represents here, as it did in the District Court, that it is willing and prepared to transfer the shares once Mr. Coderch makes the requisite payment. EGI has chosen not to transfer the shares yet because EGI fears that it would substantially weaken its economic position if it had neither the shares nor the money to which it is entitled.

of such purchases [of preferred stock made pursuant to the put right], the respective number of relevant shares of Preferred Stock *shall be transferred* to the Put Buyer against full payment in cash for such shares" (emphases added). That simultaneous exchange of shares for money is what the arbitrator ordered. To the extent that the District Court enforced the Arbitration Award as a money judgment, the District Court erred.

That said, Mr. Coderch offers no reason why an arbitration award ordering specific performance, as opposed to money damages, is not confirmable under the Panama Convention. The Panama Convention makes no exception for the recognition of arbitration awards ordering specific performance. *See generally* Panama Convention, art. 5. And, as explained above, a district court can refuse to confirm an arbitration award only if one of the enumerated exceptions in the Panama Convention applies. Accordingly, we find that the Award was confirmable under the Panama Convention and the FAA.

The fact that the Award is an order of specific performance, as opposed to a money judgment, might be irrelevant for purposes of determining whether the Award is confirmable, but it *is* relevant to crafting the appropriate remedy. Because the District Court viewed the Award as a money judgment as opposed to an order of specific performance, it enforced only half of the Award: it ordered Mr. Coderch to pay the put price for EGI's shares but neglected to enforce the

corresponding requirement that EGI tender those shares upon payment. Instead of enforcing the Arbitration Award as requested by EGI, the District Court's order should have required Mr. Coderch to pay the purchase price set out in the Shareholders' Agreement and the Award *and* in exchange required EGI to tender its shares.[14] Because the District Court did not do this, it erred.

IV.

In conclusion, we hold that while the District Court properly found that the Arbitration Award should be confirmed under the Panama Convention, the Court committed two errors in enforcing that award. First, it clearly erred by accepting EGI's calculation of the purchase price due under the award, which used the wrong conversion date. Second, it failed to fully enforce the Award by neglecting to order EGI to tender its shares upon payment, as EGI is required to do under

[14] To facilitate the transfer, the District Court could have then required both parties to tender their performance to the Clerk of Court, as is customary in cases of forced sales, rather than directly to each other. That way, once the Clerk receives the shares from EGI and the payment from Mr. Coderch, he or she could effectuate the simultaneous transfer of shares for money that the Shareholders' Agreement and the Arbitration Award contemplate. Such an approach would also ensure that neither party ends up with a windfall if the other reneges (as each party here worries the other will do) and would put to rest this never-ending game of chicken concerning who will perform first and risk ending up with nothing at all.

Of course, this still begs the question of how to enforce an order of specific performance if one of the parties still refuses to perform. Fortunately, the District Court has plenty of tools in its chest to deal with a party's failure to comply with the Court's own orders. For example, the District Court might set a specific date on which performance under its order is due, and provide that for every day after the deadline that the party refuses to comply, the District Court will impose a hefty monetary fine on the offending party. Those accumulating fines would then be enforceable as money judgments against the offending party.

Section 10 of the Shareholders' Agreement. We therefore **VACATE** the District Court's order and **REMAND** with the following instructions: (1) to recalculate the purchase price of the shares using the January 13, 2012, conversion date; and (2) to enter an order requiring both Mr. Coderch and EGI to perform their obligations under Section 10 of the Shareholders' Agreement by paying the purchase price for the relevant shares, after proper calculation and conversion, and tendering those shares, respectively.

SO ORDERED.

Appendix B

United States District Court
for the
Southern District of Florida

EGI-VSR, LLC, Petitioner, v.	)	
	)	
Juan Carlos Celestino Coderch Mitjans, Respondent.	)	Civil Action No. 15-20098-Civ-Scola
	)	
	)	
	)	

Omnibus Order on Motion to Quash, Motion to Strike, and Motion to Confirm Arbitration Award

This matter is before the Court upon the Respondent's motion to quash purported service of process and to dismiss petition to confirm international arbitration award (Mot., ECF No. 21.) In conjunction with the motion to quash, the Respondent also filed a motion to strike declarations (ECF No. 33.) The Court held a hearing on May 31, 2018. Following review of the motions and the arguments of counsel, the Court **denies** the motion to quash (**ECF No. 21**), **denies as moot** the motion to strike (**ECF No. 33**), and **grants** the motion to confirm the arbitration award (**ECF No. 1**).

1. Background

This case arises as a result of an investment in wine gone sour. The Petitioner EGI-VSR is a Delaware company that purchased over four million preferred shares of stock in October, 2005 in Viña San Rafael S.A. ("VSR"), a private corporation that produces and distributes wine. The Respondent is a Chilean citizen and a controlling shareholder of VSR, along with additional parties not named in the instant action. At the time of the Petitioner's initial purchase, the parties entered into a shareholders' agreement (the "Agreement") (ECF No. 1-3), which contains an arbitration clause and a provision stating that a breach by controlling shareholders would trigger

a put right for the Petitioner, requiring the controlling shareholders to purchase all of the Petitioner's shares at a certain price within a certain amount of time. (*See id*. ¶ 10.) The Petitioner ultimately purchased additional shares, and made a total investment of approximately $17 million in VSR over four years.

In October, 2009, based upon numerous breaches of the Agreement by the controlling shareholders, including the Respondent, the Petitioner informed the controlling shareholders that it would exercise its put right, and invoked the arbitration clause in the Agreement. The parties participated in an arbitration in Chile, in which the arbitrator determined that the controlling shareholders violated several sections of the Agreement and ordered them to buy the Petitioner's shares. (*See* Final Award, ECF No. 1-4.) The Respondent unsuccessfully challenged the Final Award.

The Petitioner filed this action in January, 2015, seeking to have this Court confirm the Final Award under the Panama and New York Conventions, and enter a judgment order setting forth the total price to be paid to the Petitioner for the shares the Respondent was to purchase according to the Final Award. The Petitioner then filed a notice, informing the Court that it had filed a request for service abroad of extrajudicial documents pursuant to the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, O.A.S.T.S. No. 43, 1438 U.N.T.S. 288. (ECF No. 11.) Shortly after, the Petitioner requested that the Court grant an extension of time in which to effectuate foreign service anticipating that service would require at least a year, (ECF No. 12), which request the Court granted, and stayed this case requiring the Petitioner to inform the Court when service was effectuated. (ECF No. 13.) In October, 2017, the Court reopened this case upon the Petitioner's notice that service had been effectuated. (ECF No. 17.)

In the instant motion, the Respondent challenges service of process, and requests that the

Court dismiss the petition for improper venue and on substantive grounds.

2. Legal Standard and Applicable Law

The parties do not dispute that the arbitration at issue here is governed by the Inter-American Convention on International Commercial Arbitration (opened for signature Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245) (referred to interchangeably as both the "Panama Convention" and the "Inter- American Convention"). *See* 9 U.S.C. §§ 301-307 (implementing the Convention).[1] "Because the Final Arbitration Award was made in a nation that is a signatory of the Inter-American Convention, the Final Arbitration Award is entitled to be recognized and enforced, unless an appropriate exception for non-recognition applies." *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1372 (S.D. Fla. 2003) (Marra, J.) (citing 9 U.S.C. § 304). "In 9 U.S.C. §301, section 207 of the FAA is incorporated by reference and applied to Panama Convention awards." *Empresa De Telecommunicaciones De Bogota S.A. E.S.P. v. Mercury Telco Grp., Inc.*, 670 F. Supp. 2d 1357, 1361 (S.D. Fla. 2009) (Marra, J.). Section 207 provides that confirmation of an arbitral award falling under the Convention is mandatory "unless [a court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. The Convention also contains a residual clause which provides that Chapter 1 of the FAA applies to actions brought under the Convention, so long as it does not conflict with the Convention or its

[1] With respect to enforcement matters and interpretation, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970), reprinted in 9 U.S.C. §§ 201-208, and the Panama Convention are substantially identical. Thus the case law interpreting provisions of the New York Convention are largely applicable to the Panama Convention and vice versa. *See Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642, 653 (S.D.N.Y. 2013), *aff'd*, 832 F.3d 92 (2d Cir. 2016) ("The Panama Convention and . . . the []New York Convention[] are largely similar, and so precedents under one are generally applicable to the other.") (citing *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) ("The legislative history of the [Panama] Convention's implementing statute . . . clearly demonstrates that Congress intended the [Panama] Convention to reach the same results as those reached under the New York Convention" such that "courts in the United States would achieve a general uniformity of results under the two conventions.").

implementing legislation. 9 U.S.C. § 208.

"A district court's review of a foreign arbitration award is quite circumscribed" and "there is a general pro-enforcement bias manifested in the Convention." *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1366, 1367 (S.D. Fla. 2009) (Moore, J.) (quotations and alterations omitted). It is really "only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *S. Mills, Inc. v. Nunes*, 586 F. App'x 702, 704 (11th Cir. 2014) (quoting *Stolt- Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 671, (2010)) (quotations marks omitted).

3. Analysis

A. Service of process was valid

The Respondent first challenges service of process, arguing that the purported service was invalid under Brazilian law. The parties agree that in challenging service of process, a burden-shifting approach applies. The Respondent bears the initial burden of challenging service and detailing how service fell short of the procedural requirements. *Quantum Capital, LLC v. Banco De Los Trabajadores*, No. 1:14-cv-213193, 2014 WL 12519757, at *3 (S.D. Fla. Nov. 21, 2014) (Ungaro, J.) (internal citation omitted). The burden then shifts to the Petitioner to establish a prima facie case of proper service. *Id*. Assuming the Petitioner can establish proper service, the burden then shifts back to the Respondent, who must show "strong and convincing evidence" of insufficient service of process. *Id*.

The Respondent contends that service upon him in Brazil was invalid because he no longer lived in Brazil. The parties expend many pages of argument in their papers, and attach a

host of exhibits, with respect to the validity of service of process.[2] However, as previously stated, the Petitioner in this case availed itself of the Inter-American Convention on Letters Rogatory, which states in pertinent part that "[l]etters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination." O.A.S.T.S. No. 43, 1438 U.N.T.S. 288, art. 10. The Convention also states that "[t]he authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory." *Id.*, art. 11. In its response and supporting documents (ECF No. 30), the Petitioner represents that the Superior Judicial Tribunal in Brazil determined that the Respondent was properly served, a fact which the Respondent does not dispute. (*See* ECF No. 30-1 at 33-40.) The Respondent cites no legal authority indicating that it is proper for this Court to review a determination by the Brazilian court that service of process was carried out in accordance with Brazilian law in this case. Rather, the Respondent should have challenged service of process in Brazil. As a result, the Respondent's attempt to challenge service of process before this Court is improper.

Nevertheless, even if the Respondent's challenge were proper, he has not presented strong and convincing evidence that the process undertaken in Brazil was improper or insufficient. Indeed, the materials submitted by the parties reflect that the Respondent took action to terminate his Brazilian residency after the initial attempts to serve him at his apartment in Rio de Janeiro failed. Thereafter, the Brazilian court determined that the Respondent was evading service of process, permitted service of process by *hora certa*, and certified that service had been carried out. (ECF No. 30-11 at 38.) There was ample evidence presented to the Brazilian court to substantiate its finding that the Respondent was evading service. Therefore, the Respondent has failed to make the necessary showing.

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[2] In addition, the Respondent seeks to have several of the exhibits stricken. (*See* Mot. to Strike, ECF No. 33.)

B. The Final Award should be confirmed

Much like his challenge to service of process, the Respondent's challenge to the Petitioner's request for confirmation of the underlying arbitration award is misplaced.

First, the Respondent argues that the motion to confirm the arbitration award should be dismissed under Rule 12(b)(3) of the Federal Rules of Civil Procedure for improper venue. In proceedings to confirm an arbitration award under the Federal Arbitration Act, venue lies in "any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States." 9 U.S.C. § 204. The Respondent argues that venue is improper because the underlying action could not have been brought in this district under the general venue statute, and the arbitration took place in Chile.

The general venue statute states that "a defendant not resident in the United States may be sued in any judicial district." 28 U.S.C. § 1391(c)(3). The Respondent is not a resident of the United States. Nevertheless, the Respondent also appears to be mounting a challenge to personal jurisdiction and arguing forum non conveniens, in that he maintains that this action could not have been brought in this district because the underlying controversy has no connection to this district. However, the issue of venue is distinct from the issue of personal jurisdiction and the Respondent once again fails to support his additional arguments with citations to authority. Generally, a "litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him." *Phillips v. Hillcrest Medical Ctr.*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) (internal quotation omitted); *see also*

McPherson v. Kelsey, 125 F.3d 989, 995-96 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones.") (internal quotation omitted). Thus, the Court does not consider these arguments.

Next, the Respondent argues that the Petitioner's motion to confirm the arbitration award should be dismissed because it is a non-monetary award and therefore not recognized under Florida's Uniform Out-of-Country Foreign Money Judgment Recognition Act, Fla. Stat. §§ 55.601-55.607 (the "Uniform Act"), and recognition of it would violate public policy. In addition, the Respondent maintains that the Court cannot confirm the award as requested because it would substantially modify the Final Award. In response, the Petitioner contends that the Uniform Act does not apply, that the Respondent has not proven that any exceptions under the Panama Convention to the recognition of the Final Award apply, and that the Final Award is a calculable monetary award. The Court considers each argument in turn.

Although the Uniform Act applies to the recognition of foreign judgments, the Respondent fails to point to any authority indicating that the Final Award is a judgment and that the Uniform Act applies in this case. The Respondent points to Article 4 of the Panama Convention,[3] which states in pertinent part, that "[a]n arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment." O.A.S.T.S. No. 42, 1438 U.N.T.S. 245, art. 4. However, the Respondent fails to point to any authority indicating that giving an arbitral award the force of a final judicial judgment pushes such awards into the purview of the Uniform Act. The Uniform Act defines an "out-of-country foreign judgment" as "any judgment of a foreign state granting or denying

[3] As previously stated, the parties in the instant case do not dispute that the Panama Convention applies.

recovery of a sum of money . . . .” Fla. Stat. § 55.602(2). The Final Award in this case was rendered by an arbitrator, and not a foreign state; thus, the Court is not persuaded that the Uniform Act applies.

In addition, the case from this district that the Respondent relies upon in support of his argument indicates that the Uniform Act does not apply to an international arbitration award. *Nicor Int’l Corp.*, 292 F. Supp. 2d at 1372. In *Nicor*, the court confirmed an arbitration award after determining that the Panama Convention properly applied to the award involved, and evaluating whether any of the grounds for non-recognition set forth in the New York Convention, and incorporated by reference into the Panama Convention, applied. *Id.* at 1375.

Thus, the Court may only refuse to confirm the arbitration award if one of the exceptions applies. *See* 9 U.S.C. § 207. The Panama Convention specifies as follows:

> 1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
>
> a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
>
> b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
>
> c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
>
> d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

> e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.
>
> 2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:
>
> a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
>
> b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

O.A.S.T.S. No. 42, 1438 U.N.T.S. 245, art. 4. The Respondent fails to set forth a sufficient basis upon which any of the exceptions would apply in this case.[4] Indeed, the only specifically asserted exception is that recognition of the Final Award would offend public policy; however, the Respondent premises this argument upon his incorrect assumption that the Uniform Act applies in this case. As such, the argument is without merit.

Finally, the Respondent argues that the Final Award cannot be confirmed as requested in the petition because the judgment the Petitioner seeks substantially modifies the Final Award. Part of the Respondent's argument appears to turn on his contention that the Final Award does not in fact award a damage amount, but the argument again is premised upon the Respondent's additional contention—which the Court has already rejected—that the Final Award must be a judgment in order to be enforceable. The Final Award clearly sets forth the manner in which to calculate the amount owed by the Respondent based upon a finding by the arbitrator that he failed to comply with his obligation under the parties' Agreement, to repurchase the Petitioner's shares pursuant to its put right. (*See* Final Award, ECF No. 1-5 at 103-104.)

In response, the Petitioner has provided the Court with a detailed breakdown of its calculations, in accordance with the provisions of the Final Award, of the amount for which it

---

[4] Notably, the Panama Convention does not except awards in the nature of specific performance—as the Respondent contends the Final Award is in this case—which characterization nevertheless is inaccurate.

seeks confirmation. (*See* ECF No. 30-7 at 6- 14.) Nevertheless, the Respondent takes issue with the Petitioner's conversion of the amount from Unidades de Fomento ("UF") to United States dollars because the Agreement requires the amount to be in Chilean pesos, arguing that utilizing the UF rate (which adjusts for inflation) on the date that payment was due under the Final Award (January 23, 2012), results in an inflated award amount.

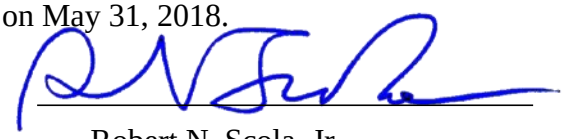
The Respondents' contention fails. First, the Final Award specifically sets an applicable rate in UF, not Chilean pesos, as the basis for calculating the appropriate Preferred Purchase Price. If the Respondent believed that the Agreement required something different, it was incumbent upon him to make that challenge before the arbitrator. Second, a review of the calculations reveals that the Petitioner first performed the calculation of the Preferred Purchase Price per share as set forth in paragraph 4 of the Final Award, then converted the applicable UF rate to Chilean pesos, and then to United States dollars on the date that payment became due under the Final Award. The Respondent points to no authority, nor has the Court found any, indicating that the conversion to dollars is improper. Moreover, to the extent that the Respondent argues that earlier conversion rates (i.e., from 2005 to 2009) should apply because of the dates specifically mentioned in the Final Award, it is clear that these dates relate to the start dates for calculation of interest based upon the dates that the Petitioner made each stock purchase.

4. Conclusion

For the reasons stated above, the Respondent has failed to demonstrate that the Court should not confirm the Final Award in this case. Accordingly, the Court **denies** the Respondent's motion to quash and to dismiss (**ECF No. 21**). The motion to strike (**ECF No. 33**) is **denied as moot**, and the motion to confirm the arbitration award (**ECF No. 1**) is **granted**. The Petitioner shall submit its proposed judgment to the Court in Word format for entry. The Clerk of Court is

directed to **close** this case.

Done and ordered at Miami, Florida on May 31, 2018.



Robert N. Scola, Jr.
United States District Judge

Appendix C

United States District Court
for the
Southern District of Florida

EGI-VSR, LLC, Petitioner,	)	
	)	
v.	)	
	)	Civil Action No. 15-20098-Civ-Scola
Juan Carlos Celestino Coderch Mitjans, Respondent.	)	

Final Judgment

This matter came before the Court upon EGI-VSR, LLC's Petition to Confirm International Arbitral Award ("Petition") (ECF No. 1), and the Court being otherwise fully advised in the premises, with both parties represented by counsel, for the reasons stated in the Court's Omnibus Order on Motion to Quash, Motion to Strike, and Motion to Confirm Arbitration Award (ECF No. 41) entered on June 1, 2018, the Petition is **granted.** Accordingly, it is ordered as follows:

1) The arbitration award in favor of EGI-VSR, LLC and against Juan Carlos Celestino Coderch Mitjans, dated January 13, 2012 ("Final Award") is **confirmed.**

2) Pursuant to the terms of the Final Award, final judgment is entered in favor of EGI-VSR, LLC and against Juan Carlos Celestino Coderch Mitjans, a/k/a Juan Coderch in the United States dollar amount of **$28,700,450.07**.

3) EGI-VSR shall be entitled to post-judgment interest to be calculated in accordance with 28 U.S.C. § 1961, commencing on the date of this Final Judgment.

4) In the event that EGI-VSR secures other judgments enforcing the same Final Award, then any payment in satisfaction in whole or in part of this Final Judgment will constitute payment toward any other enforcing judgment based upon this same award, such that the Petitioner may not recover more in total on account of this Final Judgment and any other enforcing judgments, than the amount of this Final Judgment and applicable post-judgment interest.

Done and ordered at Miami, Florida on June 4, 2018.

Robert N. Scola, Jr.
United States District Judge

Appendix D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12615-EE

EGI-VSR, LLC,

Plaintiff - Appellee,

versus

JUAN CARLOS CELESTIN CODERCH MITJANS,
a.k.a. Juan Coderch,

Defendant - Appellant.

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

ORDER:

Appellant's "Corrected Motion to Stay Mandate" is DENIED.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION