

[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.

* 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,

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 rogatory⁷ 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 comity⁹ 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

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

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.