Eleventh Circuit Ruling Offers Guidance to International Businesses and Lawyers

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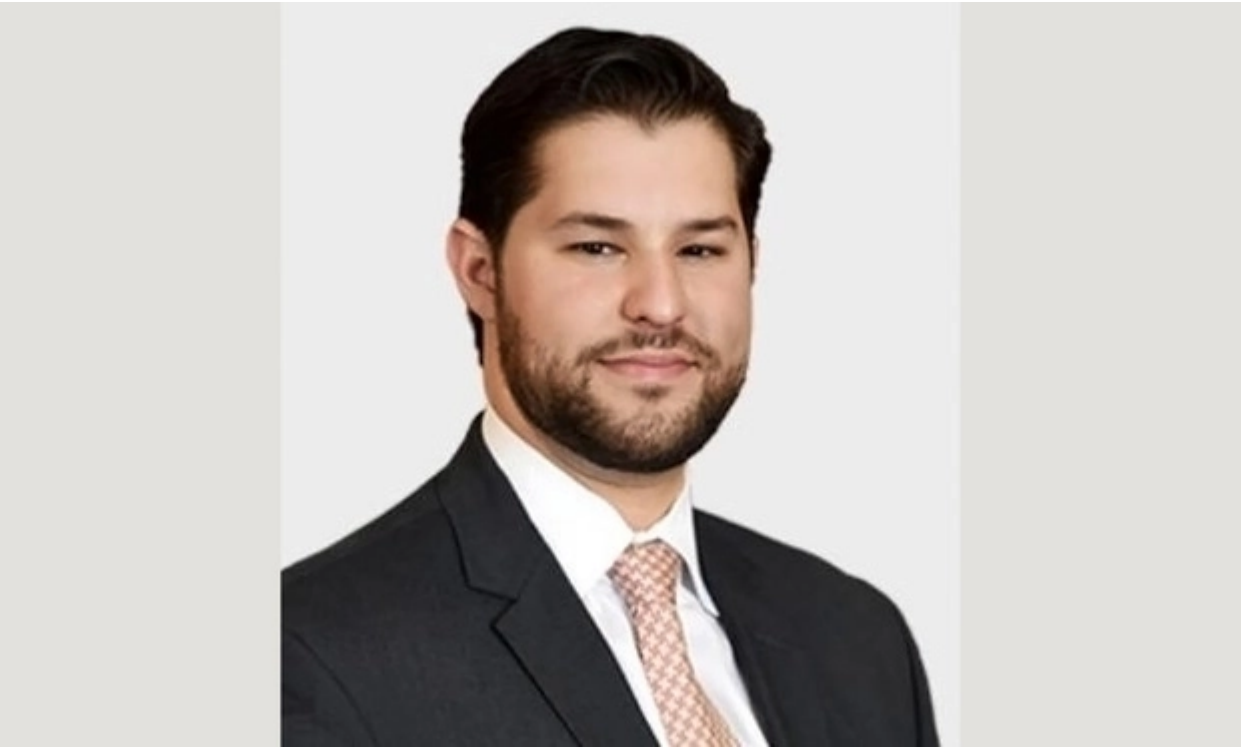
By **Jordi C. Martínez-Cid** | July 30, 2020



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The appellate court's June 25 opinion in *EGI-VSR v. Coderch Mitjans*, reversed in part and affirmed in part a $28 million Chilean arbitral award that the holder sought to confirm in Florida. The underlying arbitration resolved a claim for breach of a shareholder agreement brought by EGI-VSR, LLC against Juan Carlos

Celestino Coderch Mitjans. EGI-VSR, LLC convinced the arbitrator that Coderch Mitjans breached the agreement by failing to buy EGI-VSR, LLC's shares in a Chilean wine company, Viña Rafael S.A.

As a result, the claimant should shortly have an enforceable judgment, some 10 years after the initial breach of contract.

At the center of the appeal were arguments regarding the validity of service of process under foreign law, whether the award could be enforced given certain rulings and its ambiguities, and the proper currency conversion date. A closer look at the rulings on each argument highlights points that international businesses and lawyers should consider to avoid prolonged litigation.

First, U.S. courts will often defer to foreign tribunals and processes regarding formal notification of a lawsuit or petition. As a result, service of process may be effective even if the target has merely constructive, as opposed to actual, notice of the claim. And this constructive notice may not comport with what businesses, individuals, or perhaps a U.S. court would consider fair notice for a wholly domestic claim.

In *EGI-VSR*, the district court deferred to Brazilian law and held that the party contesting service was effectively notified of the lawsuit through a procedure called *citação por hora certa* ("service of process at a designated time"). In this case, a court official tried serving the target at an address a couple of times. There seemed to be no dispute that the target was not living there at that time. After a couple of fruitless attempts, the court official informed the doorman that he would be back at a certain date and time, and then, when he returned, left a copy of the official service with the doorman. This was deemed sufficient.

Parties should try to avoid leaving awards and judgments unsatisfied and they should consider attacking the propriety of service in the jurisdiction where it was purportedly accomplished. While the arguments in *EGI-VSR,* suggest that the outcome would not have been different if service was attacked in Brazil, the sooner a party acts, the better the outcome tends to be.

Second, if a party has obtained an arbitral award, it should be analyzed for any inconsistencies or ambiguities that could provoke a potential challenge. This should be done before seeking to confirm it or engaging in significant and expensive confirmation and collection efforts.

In *EGI-VSR,* the party contesting the arbitral award argued that it was non-final (and therefore unenforceable) because the award failed to specify which currency should be used to satisfy the award and on what day the currency conversion should take place. The court discounted that argument as there seemed to be no dispute that the proper currency was Chilean pesos and because, as explained below, the court could establish a currency conversion date as a matter of law.

The plaintiff could have avoided this issue entirely, and likely saved itself significant legal fees, if it had clarified these issues with the arbitrator. Simply put, if a party has already won its award, it is almost always better to deal with those issues before the arbitrator who knows the facts and is disposed towards that party. Doing so is likely more effective and less expensive than having to duke it out in additional judicial proceedings. A party challenging the award might well prefer to take its chances before a different judge and will harp on the inconsistency or ambiguity as proof that the award should not be enforced.

Third, attention should be paid to currency-conversion issues at the outset of the arbitral or litigation dispute. Exchange rates and inflation can be volatile, and having the arbitral award reduced to or confirmed quickly as a more stable currency can avoid significant losses of real value.

In *EGI-VSR,* the Eleventh Circuit held that the proper conversion date was "established as a matter of law." It was the currency exchange rate in effect "when the plaintiff's cause of action ar[ose] under U.S. law." This is sometimes referred to as the "breach day" rule. The plaintiff's cause of action arose when it received the

arbitral award because that award entitled the plaintiff to bring a petition to confirm it in a U.S. court. The arbitration, however, was governed by Chilean law, and if Chile similarly had a "breach day" rule, then the currency conversion date would likely have been three years before entry of the award.

Again, given exchange rates, inflation, currency controls and the like, this could have a significant impact on a claimant's bottom line. To take an extreme example, if the lawsuit involved Venezuelan bolivars, a three-year difference could potentially mean the difference between a multimillion-dollar award and an insignificant sum not worth pursuing.

Counsel experienced in these issues and who understand the international landscape can help individuals and companies get the best possible return for their investment on their claim or can better prepare a defense to those claims. Businesses and individuals that may be dealing with international claims should reach out to counsel at the earliest possible time.

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