Skadden

Latin America Dispute Resolution Update

The Latest Developments in Cross-Border Disputes Involving the US and Latin America

The Continuing Rise of Chinese Investment in Latin America

Chinese investment and transactions in Latin America exceeded US$125 billion in the last decade, and China is expected to continue to be a key player in Latin America in the years to come.

Skadden recently hosted two webinars titled "Minimizing Risks and Maximizing Opportunities in China-Latin America Investment," which examined the key trends in Chinese investment in Latin America over the last decade, including significant investment in Brazil, Argentina, Venezuela and, more recently, Ecuador and Peru. In 2015, China committed to invest an additional US$250 billion in Latin America over the next decade and spread its investment across both traditionally important sectors such as minerals, oil and gas, as well as new sectors, including technology and banking. With investment comes increased potential for disputes. For example, Chinese parties have become more adept at using investment treaty provisions to challenge state acts that interfere with their investment. They also have increased their stakes in joint ventures and other acquisitions, leading to potential shareholder claims and other post-acquisition disputes.

Latin American counterparties should be aware that "outbound" equity investments by Chinese companies often require regulatory approval in China. Recent reports indicate that Chinese authorities will enact a stricter agenda aimed at limiting certain large transactions involving foreign entities. China also has become stricter about compliance and anti-corruption; according to recent reports, more than 1 million officials have been sanctioned for corruption-related violations in the past three years.

Click here for a summary of the February 6, 2017, webinar's key takeaways.

Investment Arbitration: Cases Against Colombia Top the Charts for 2016

In the past year, a series of investment treaty claims have been brought against Colombia, and press reports indicate that more disputes are to come. The claims appear to arise from a number of distinct regulatory actions enacted by administrative authorities, which, investors allege, interfere with their investment expectations or, in some cases, may amount to expropriation. For example,

Recent US Court Decisions of Interest

Service on Non-US Parties

On May 22, 2017, the U.S. Supreme Court issued a decision that may permit parties in U.S. litigation to serve defendants located outside of the United States by mail rather than through more formal (and more time-consuming) service channels. In *Water Splash, Inc. v. Menon* (U.S. Supreme Court Docket No. 16-254), the Court held that Article 10 of the Hague Service Convention — an international treaty governing procedures for service on parties located abroad — permits service on a foreign defendant by mail where the defendant's home country has not made any reservation to Article 10 specifically objecting to mail service, and applicable U.S. state law would otherwise permit service by mail.

Mexico, Venezuela and Argentina are parties to the Hague Service Convention, but all three have made express reservations regarding service by mail. Accordingly, the Supreme Court decision will not affect parties located in these jurisdictions. Nonetheless, lawyers in Latin America should be aware that New York courts may permit service by mail on defendants located in states that are party to the Inter-American Convention on Letters Rogatory and Additional Protocol (IACAP), another convention regarding service to which most Latin American states are party. In *Morgenthau v. Avion Res. Ltd.*, 898 N.E.2d 929, 933 (N.Y. 2008), the New York Court of Appeals considered whether service by mail on defendants in Brazil was valid. The Brazilian defendant argued that both IACAP and local Brazilian procedures required service through letters rogatory or formal diplomatic channels. The New York court held that IACAP did not provide an exclusive method of service, nor were plaintiffs in New York cases bound to follow the requirements for service established in the

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a number of the disputes focus on the country's mining sector. One claim is linked to actions taken by regulators following the Colombia Constitutional Court's recent decision to limit mining in environmentally sensitive regions; another challenges royalties allegedly owed by a mining company active in the country. Other investors have brought or threatened claims in the pharmaceutical, telecommunications and energy sectors.

ICC Launches Office in Brazil

On May 4, 2017, the International Chamber of Commerce (ICC) launched an office in São Paulo, Brazil. From the new office, a case management team will work closely with the Latin America team at the ICC's Paris headquarters to assist with arbitrations involving Brazilian and Latin American parties. According to recent ICC dispute resolution statistics, Brazil accounts for close to 30 percent of all parties involved in ICC arbitrations in the Latin American and Caribbean region. Skadden sponsored the ICC's Brazilian Arbitration Day on May 4, 2017, during which the launch was announced.

Financial Institutions Consider Using International Arbitration

Financial institutions historically have preferred to adjudicate disputes in domestic courts rather than in arbitration. In recent years, financial institutions have begun to consider incorporating arbitration clauses in their international contracts. In 2013, the International Swaps and Derivatives Association included an arbitration option in its master agreement for derivative transactions. Soon thereafter, a group called P.R.I.M.E. Finance, working out of the Permanent Court of Arbitration in the Hague, established a detailed set of arbitration rules and a panel of specialized arbitrators to resolve complex financial disputes. Most recently, the ICC issued a report on financial institutions and international arbitration, available here, that addresses key misconceptions about arbitration in the financial services industry and identifies several key types of financial disputes where arbitration may be a preferable alternative to litigation.

Discovery From US Courts in Aid of Foreign Proceedings

Parties involved in proceedings outside the United States should be aware that they may be able to petition a U.S. court to obtain documents or evidence from entities or persons located within the United States. Pursuant to federal statute 28 U.S.C. § 1782, a party may apply to a U.S. court for discovery to use before a "foreign or international tribunal" in connection with judicial, administrative and quasi-judicial proceedings abroad. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004). Historically, there has been some debate as to whether the term "foreign tribunal" in the statute includes reference to a "foreign arbitral tribunal" or whether the assistance should be limited to foreign courts. New York federal courts appear to be moving toward recognition of Section 1782 as including foreign arbitral tribunals. In the most recent decision, *Ex Parte Application of Kleimar NV*, 16-mc-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016), a federal district court judge found that the London Maritime Arbitrators Association (a private arbitration administrator, like the ICC) was "a foreign tribunal" falling within the meaning of Section 1782. As a result, the court granted discovery to Kleimar of documents held by Vale Americas, an indirect subsidiary of Vale S.A., which was not a party to the arbitration but allegedly held relevant documents.

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jurisdiction where service occurred. Instead, the various methods of service on international parties authorized by New York statute — including service by mail — were equally permissible.

In light of *Water Splash* and *Morgenthau*, it is increasingly likely that parties suing in the United States or in New York courts may attempt to serve Latin American defendants by mail. It should be noted, however, that where a U.S. final judgment must be enforced against the defendant in its home jurisdiction, a local court may disagree with the validity of mail service and deny enforcement based on the failure to serve in compliance with its own view of IACAP or local law.

Jurisdiction Over Non-US Parties

In order to be sued in the United States, a U.S. court must have a basis to exercise "personal jurisdiction" over the defendant. For many years, courts took an expansive view that they could exercise "general" personal jurisdiction on the basis of continuous and systemic contacts of the defendant in the U.S. The U.S. Supreme Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) changed this landscape significantly for foreign corporations, holding that a corporation is only subject to general jurisdiction where it is "at home" — usually, its place of incorporation and/or its principal place of business.

New York state law requires an out-of-state corporation doing business in New York to register with the secretary of state. For years, New York courts held that such registration constituted "consent" to personal jurisdiction in New York. Since *Daimler*, the continued viability of the "consent" doctrine has been drawn into question. Recently, the U.S. Court of Appeals for the Second Circuit issued two decisions that — although far from definitive — raise questions as to whether registration to do business in New York can still provide a basis for personal jurisdiction where the defendant is neither incorporated nor headquartered in New York. In *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the Second Circuit stated that subjecting a defendant to general personal jurisdiction based on registration alone "may no longer be sound in light of [*Daimler*]" but ultimately declined to reach the issue. In *Ritchie Capital Mgmt. v. Costco Wholesale Corp.*, 667 F. App'x 328 (2d Cir. 2016), the court considered Connecticut's registration statute and found that it did not require a consent to jurisdiction but noted that if it had required such consent, there would be "a much more difficult constitutional question about the validity of such consent after *Daimler*."

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