

Minimizing Risks and Maximizing Opportunities in China-Latin America Investment

Contacts

Julie Bédard

+1.212.735.3236 (New York)
+55.11.3708.1849 (São Paulo)
julie.bedard@skadden.com

Chiann Bao

+852.3740.4795 (Hong Kong)
chiann.bao@skadden.com

Jennifer Permesly

+1.212.735.3723 (New York)
jennifer.permesly@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

On February 6, 2017, Skadden hosted the webinar “Minimizing Risks and Maximizing Opportunities in China-Latin America Investment.” Topics of discussion included the increasing importance of Chinese investment in Latin America, the nature and type of disputes that may arise from China-Latin America relationships and how parties can minimize the risks associated with such disputes through dispute resolution planning. Skadden speakers were Julie Bédard, Jennifer Permesly and Chiann Bao, all of the international litigation and arbitration practice.

Ms. Permesly, who is based in New York and is fluent in Spanish, began by providing an overview of the trends in Chinese investments in Latin America over the past decade. Latin America accounts for a significant percentage of all Chinese outbound foreign direct investment (FDI) and contracts entered by Chinese parties, with approximately \$125 billion in total Chinese investment in the region over the last decade. Chinese state-owned and private parties have focused on acquiring natural resources assets, particularly in the minerals and oil and gas sectors. Traditionally, China has had strong relationships with Brazil, Argentina and Venezuela, but in recent years it has formed deeper ties with Peru and Ecuador as well as a number of other Latin America countries. Ms. Permesly highlighted China’s deep commitment to the region going forward, noting the country’s plan to invest an additional \$250 billion in the region over the next decade and to diversify its investments into the technology, scientific innovation and banking sectors. However, she also noted that recent reports of potential governmental restrictions on Chinese outbound investments in an effort to control capital outflow may affect China’s investment trends going forward.

With this investment climate in mind, Ms. Bédard, who is based in São Paulo and New York and is fluent in Spanish and Portuguese, turned to a discussion of the types of challenges that are often seen in connection with Chinese-Latin American relationships. She highlighted challenges that Chinese-Latin American parties may confront, including environmental and other issues raised by local communities in mineral or energy development projects, legal uncertainty that may arise in developing areas of Latin American legislation, and allegations of corruption in the making or continuing of contractual relationships. Ms. Bédard noted that Chinese claimants brought several investor-state arbitrations in the mining and raw material sectors challenging regulatory actions or expropriation conduct by Latin American states, and some of these disputes have involved an element of potential corruption allegations.

Key Takeaways

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Ms. Bédard emphasized that regulatory approvals for joint ventures are the cause of many disputes, as virtually all “outbound” equity investments by Chinese companies require regulatory approval in China, which may lead to significant delay. For joint ventures among offshore holding companies, Ms. Bédard emphasized the importance of conducting adequate due diligence and “knowing your buyer” in connection with preventing potential disputes. In some instances, Chinese data privacy and state secrecy laws may limit the information available to Latin American companies.

Finally, Ms. Bédard noted the impact of corruption and other illegalities on contractual disputes and investor-state claims, noting that China and all Latin American countries are parties to the United Nations Convention Against Corruption. She provided examples from investor-state arbitrations where allegations of corruption resulted in decisions by tribunals to decline jurisdiction on the basis that the investments were not legal.

Ms. Bao, who is based in Hong Kong and is fluent in Mandarin, addressed ways to minimize risks through dispute resolution planning. She began by noting that among Latin American and Chinese parties, arbitration has emerged as the preferred method of dispute resolution. Whether parties should insist on arbitration in their China-Latin America agreement will depend on numerous factors, but generally speaking the neutrality of the arbitral forum is the key factor tilting the balance in favor of arbitration. Ms. Bao reviewed a number of arbitral seats that may be utilized in connection with China-Latin America relationships, including the generally arbitration-friendly seats of Hong Kong and Singapore, both of which are attractive to Chinese parties. She also commented on the advantages and disadvantages of the various arbitration institutions most often chosen by parties from China or Latin America. She highlighted the differences between the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre, and also explained the nuances associated with conducting arbitrations through the China International Economic and Trade Arbitration Commission (CIETAC). Noteworthy was the fact that CIETAC only appoints from its panel, which is comprised of 80 percent Chinese nationals, unless otherwise agreed upon by contract.

Ms. Bao noted that agreements with state-owned entities, which often arise in the context of Chinese-Latin American investment, raise special considerations — such as sovereign immunity — and parties should consider incorporating express waiver language in their contracts to address these issues. Furthermore, when contracting with a Chinese party, there are certain instances when contracts are legally required to be governed by Chinese law, including when the contract must be performed in whole or in part in mainland China, where certain mandatory laws apply, or if there is potential for damage to the “social and political interests” of China. Parties should therefore consult with legal counsel in order to ensure an enforceable dispute resolution clause.

With respect to the enforcement of awards, China and most Latin American countries are party to the New York Convention, and the People’s Republic of China has been generally supportive of upholding arbitration awards.

Ms. Bédard noted the availability of bilateral investment treaties (BITs), which protect China-Latin America investment relations, noting that China has concluded 150 BITs and treaties with investment protections, 128 of which are currently in force. Chinese investors may be able to structure investments in Latin America through certain investment vehicles to take advantage of treaty protections.

In conclusion, Ms. Bédard reiterated that buyers and sellers of business assets throughout Latin America should expect that China will continue to be a key player well into the next decade. While there will inevitably be dispute risk associated with such transactions, careful dispute resolution planning can assist in countering some of these risks while maximizing the opportunities that will come from a dynamic and growing China-Latin America business and investment relationship.