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Latin America Dispute Resolution Update

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

Contents

Impact of COVID-19 on Cross-Border Disputes

Cross-border disputes in the year 2020 are likely to be significantly impacted by the current outbreak of COVID-19, and disputes involving Latin America are no exception. The broad range of legal concerns companies face as a result of the outbreak include labor, regulatory and liquidity issues. Many companies also are assessing the impact of COVID-19 on their commercial, financial and investment agreements. As discussed in our February 2020 client alert, government orders issued in response to the pandemic and the economic fallout of the COVID-19 crisis will affect some parties' abilities to perform their contractual obligations. The issues will be particularly complex where cross-border contracts are at play, given the vastly different ways in which the virus is impacting, and being managed in, different countries in Latin America and globally.

The COVID-19 outbreak is likely to lead to disputes over how to allocate the risk and consequences of business disruption and nonperformance, partial performance or delayed performance of contract obligations. The determination of whether COVID-19 or its economic and regulatory effects constitute a *force majeure*, a change in law or a material adverse effect, and the impact that assessment may have on a party's performance, requires individualized, fact-based analyses. Under any given contract, the application of different clauses will need to be reconciled. These clauses may include representations/warranties, *force majeure* or "material adverse event" clauses, notice requirements and termination rights.

Parties facing questions over the applicability of a *force majeure* or material adverse effect clause in a given situation will need to analyze the language of the clause and the law governing the contract to determine the availability and scope of such a defense. Under New York law, for instance, courts often construe *force majeure* clauses narrowly. Where the clause lists specific events and includes catchall language, courts have construed the clause as limited to the listed events and those similar to them. In addition, parties may need to consider:

- whether notice is required before declaring *force majeure* and in what form;
- the extent to which the viral outbreak and its ripple effects prevented, hindered or delayed the performance of the contract;
- whether reasonable expectations were frustrated and the circumstances were unforeseeable or out of the parties' control; and
- potential alternative means for performing obligations and steps to avoid or mitigate the coronavirus outbreak and its consequences.

Legal doctrines such as impossibility, frustration of purpose or others also may be relevant. Disputes over these issues are likely to be extensively debated in the coming year in both commercial arbitration and litigation. Some lawsuits already have been filed in U.S. courts.

In the world of investment arbitration, companies also may begin to consider whether certain measures imposed by governments during the COVID-19 crisis give rise to potential claims under bilateral or multilateral investment treaties. There may be a spate of new claims linked to the nature and reasonableness of government measures taken in response to the pandemic. Such claims are likely to give rise to questions regarding the appropriate measure of compensation to investors and the reasonableness of the government actions in the circumstances. These cases also raise complex questions concerning possible defenses such as necessity, public welfare, distress or *force majeure*.

The impact of COVID-19 will likely be a major factor in commercial and investment disputes in the year to come and may lead to the evolution of the commercial law on any number of issues, both in national courts and international arbitration.

Arbitral Tribunals Take Varying Approaches to Allegations of Corruption and Parallel Criminal or Regulatory Proceedings

As discussed in our January 2019 "Cross-Border Investigations Update," a number of countries in Latin America, including Argentina, Brazil and Mexico, have expanded their anti-corruption enforcement laws and initiatives in recent years. These countries have engaged in increasingly vigorous efforts to investigate and prosecute alleged bribery and corruption. As a result, arbitral tribunals in Latin American disputes are more frequently asked to address situations where one (or both) of the disputing parties or their affiliates also are the subject of parallel criminal and regulatory proceedings. Recent cases provide insights on the varying approaches taken by arbitral tribunals in light of corruption-related allegations.

In *Concesionaria Ruta Del Sol S.A.S. v. Agencia Nacional de Infraestructura*,[1] a consortium led by a Brazil-based construction company commenced an arbitration under the rules of the Bogotá Chamber of Commerce (BCC) pursuant to a concession contract for the construction of a road project. The consortium sought compensation for cost overruns and other relief from Colombia's Agencia Nacional de Infraestructura (ANI). In the wake of Brazil's Operation Car Wash, ANI sought a declaration that the contract was a nullity on the basis that it was allegedly tainted by corruption. In an award dated August 6, 2019, the BCC tribunal declared the contract null as a matter of Colombian law but recognized the investor's right of restitution for certain services actually performed under the contract.

In its decision, the BCC tribunal cited a number of other proceedings commenced against the Brazilian construction company and its representatives. These proceedings included U.S. criminal cases (which had resulted in a plea agreement entered into by the construction company) and decisions rendered in Colombian criminal actions involving company representatives. The BCC tribunal determined that the findings and statements made in these various matters were probative of wrongdoing, holding that, as a matter of Colombian law, the conclusions reached in these proceedings should be given "full evidentiary value."[2]

In contrast, other arbitral tribunals — including international tribunals — have not been willing to treat domestic criminal proceedings as evidence of wrongdoing. In *Vantage Deepwater Company v. Petrobras America Inc.*,[3] an energy services company commenced an arbitration in Houston under the rules of the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association, against Brazil's Petrobras and certain of its affiliate companies. The claim was based on an alleged breach of contract, after Petrobras cancelled a contract to lease a deep-water drilling ship. Petrobras denied liability and brought a counterclaim for damages, including on the theory that the contract had been procured fraudulently.

In support of its fraud allegations, Petrobras submitted a Brazilian federal court judgment finding certain individuals guilty of bribery and corruption in the procurement of the contract in dispute. The company also submitted evidence that the claimant had made an offer to U.S. authorities to settle claims that it had violated the U.S. Foreign Corrupt Practices Act (FCPA).

By a 2-1 vote, the ICDR arbitral tribunal rejected the fraudulent inducement claim. The tribunal held that, regardless of whether the claimants were aware of or participated in the alleged unlawful acts, subsequent novations and amendments of the contract cured it of any of the alleged illegalities.[4] The tribunal majority also

[1] *Concesionaria Ruta Del Sol S.A.S. v. Agencia Nacional de Infraestructura*, Nos. 4190 & 4209, Award (Bogotá Chamber of Commerce 2019), https://www.lavozdelderecho.com/files/180806_Laudo_Final_2.pdf.

[2] *Id.* at 491 ("da pleno valor probatorio").

[3] *Vantage Deepwater Co. v. Petrobras Am. Inc.*, No. 01-15-0004-8503, Final Award (ICDR 2018).

[4] *Id.* ¶¶ 527-29.

US Court Case of Interest: *Outokumpu Stainless USA, LLC, et al. v. GE Energy Power Conversion France SAS, Corp.*

In January 2020, the U.S. Supreme Court heard oral argument in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, a case concerning whether the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) permits a party that did not sign an arbitration agreement to compel signatories to the arbitration agreement to arbitrate against it.[5]

Outokumpu concerns a series of contracts between Outokumpu Stainless USA (a U.S. subsidiary of a Finnish steel producer) and Fives ST Corp (a French engineering affiliate) to construct three steel mills in Alabama. The contracts, governed by German law, all contain identical arbitration agreements, providing for arbitration in Dusseldorf. The contracts also extended to potential subcontractors of the contracting parties, though the arbitration agreements did not specifically reference subcontractors by name.

[5] *Cert. granted*, 139 S. Ct. 2776 (U.S. June 28, 2019) (No. 18-1048).

After a series of motor failures at the three mills, Outokumpu complained to Fives, who blamed the failures on the subcontractor responsible for motor production and installation, GE Energy Power Conversion France (GE France). When Outokumpu sued GE France in Alabama state court, GE France moved to compel arbitration under the original contract. GE France argued that because Outokumpu had agreed to submit "all disputes ... in connection with or in the performance of" the contracts to arbitration, it should be "equitably estopped" from refusing to arbitrate with a non-signatory about a matter falling under that contract.[6]

The district court compelled arbitration, but the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that "to compel arbitration, the [New York] Convention requires that the arbitration agreement be signed by the parties before the Court."[7]

[6] *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320-21 (11th Cir. 2018).

[7] *Id.* at 1326.

The Eleventh Circuit noted that Chapter 1 of the U.S. Federal Arbitration Act (FAA), which generally applies to domestic arbitrations, allows non-signatories to compel arbitration in certain circumstances, but the court found that the New York Convention (incorporated into the FAA as Chapter 2) restricts international arbitration to the specific parties to the agreement "and Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict." [8] Thus, the Eleventh Circuit held that where a party has not signed the underlying contract, it cannot compel arbitration in a New York Convention-governed dispute.

The U.S. Supreme Court granted *certiorari* in order to address the issue, and argument was held on January 21, 2020. The Supreme Court typically renders its decisions from the previous term by mid-summer.

[8] *Id.*

concluded that the evidence regarding the FCPA claims showed only "an offer of settlement, not a confession or proof with respect to [a] violation of the FCPA or the commission of bribery and corruption," adding that "consideration of that settlement offer [by the tribunal] would be contrary to a long-standing public policy at the arbitral seat (the United States)." [9]

Another instructive case is *Glencore International A.G. v. Colombia*, an International Centre for Settlement of Investment Disputes (ICSID) arbitration brought pursuant to the Switzerland-Colombia Bilateral Investment Treaty. The respondent state attempted to persuade the international tribunal that the investor was guilty of wrongdoing in the establishment of an energy investment in Colombia.[10] Specifically, Colombia cited the pendency of criminal proceedings in Colombia in which prosecutors claimed the investment was procured through corruption. The ICSID tribunal, however, did not treat these allegations as being automatically probative of corruption but instead suggested that it would make its own determination of that issue.[11] After reviewing the evidence before it, the tribunal rejected Colombia's claim that the investor had engaged in corrupt practices when the original investment contract was formed.[12]

These issues are likely to continue arising in arbitrations involving Latin American states. For example, in Ecuador, authorities are investigating alleged corruption involving employees of U.S.-based energy company WorleyParsons International, Inc. In parallel, WorleyParsons commenced an UNCITRAL investment treaty arbitration against Ecuador involving, among other things, allegations that Ecuador abused its sovereign authority by pursuing unfounded proceedings against WorleyParsons. In connection with the criminal investigation, Ecuador's national oil company recently obtained discovery in the U.S. pursuant to 28 U.S.C. § 1782 for use in the criminal investigation.[13]

Collectively, the cases discussed above indicate that, while arbitral tribunals will carefully scrutinize allegations of corruption

[9] *Id.* ¶ 173.

[10] *Glencore Int'l A.G. v. Colombia*, No. ARB/16/6, Award (ICSID 2019).

[11] *Id.* ¶ 673.

[12] *Id.* ¶ 859. An application for annulment of the award by Colombia is currently pending before ICSID.

[13] *In re: Empresa Pública De Hidrocarburos Del Ecuador - EP Petroecuador v. WorleyParsons Int'l, Inc.*, Misc. Action No. 4:19-MC-2534, Order (S.D. Tex. Apr. 13, 2020).

or bribery, the mere existence of parallel criminal or regulatory investigations will not necessarily be treated as conclusive proof that wrongdoing occurred. Rather, most tribunals will take into account the governing law, the quality and nature of proof offered, the law governing the dispute and the policies of the arbitral seat. In international cases, tribunals also have been cognizant of the circumstances in which the allegations arose (particularly when the government instituting criminal proceedings is a party to the case). This remains an evolving area, and case law on the impact of anti-corruption laws and contractual obligations is likely to grow in the years ahead.

The Growing Use of Emergency Arbitration in Latin America

Over the course of the past 10 years, most major arbitral institutions have adopted rules permitting the parties to apply to an "emergency arbitrator" for interim or emergency relief prior to the constitution of the arbitral tribunal. In April 2019, the International Chamber of Commerce (ICC) published an ICC Commission Report on Emergency Arbitrator Proceedings (ICC Report) to analyze emergency arbitration proceedings and determine any procedural and substantive issues as well as emerging trends.[14]

With respect to Latin America, the ICC Report revealed that 10 of the first 80 ICC applications for emergency arbitration made to the ICC were seated in Latin America: four in São Paulo, three in Mexico City, and one each in Bogota, Medellín and Santiago.[15] The Report also revealed that emergency arbitration applications have included parties that are nationals from Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico and Peru.[16] This suggests that parties from the region are keen to take advantage of emergency arbitrator procedures, perhaps due to the uncertainty of receiving immediate relief from local courts.

One important feature of the ICC rules providing for emergency arbitration is that these proceedings are not available where "the arbitration agreement under the Rules was concluded before 1 January 2012."[17] In one case of note referenced in the ICC Report, an emergency arbitrator concluded that he did not have jurisdiction over the emergency arbitration where the agreement was executed prior to January 2012 despite the fact that the arbitration agreement had been amended by the parties after that date. The emergency arbitrator concluded that under Brazilian law, which was the law of the contract, "the amendments did not renew the contractual relationship in its in its entirety, and that therefore the arbitration agreement was concluded prior to 1 January 2012."[18]

The ICC Report notes that the enforceability of awards issued by emergency arbitrators remains unclear internationally. Only Hong Kong, New Zealand and Singapore have expressly authorized national courts to enforce emergency arbitrator awards.[19] In the United States, courts that have considered emergency arbitration are divided over whether to enforce emergency arbitration awards.[20] Emergency arbitration may fare better in some Latin American countries. Although national laws in in the region do not expressly refer to emergency arbitration, courts in countries including Brazil, Chile, Colombia, Mexico and Venezuela reportedly have the power to issue sanctions if a party does not comply with an emergency arbitration order.[21] In addition, the ICC Report notes that the ICC national committees for Brazil, Colombia and Venezuela reported that local law is more likely to extend an arbitral tribunal's authority to grant provisional relief to an appointed emergency arbitrator than to reserve the power to grant that relief to the arbitral tribunal or a court.[22]

[14] https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/.

[15] ICC Report at 37.

[16] *Id.* at 37 n.179.

[17] ICC Arbitration Rules, Art. 29(6)(a).

[18] ICC Report ¶ 87(a).

[19] ICC Report ¶ 36.

[20] *Compare Thrivest Specialty Funding, LLC v. White*, No. 18-1877, 2019 WL 6124955 (E.D. Pa. July 1, 2019) (enforcing emergency arbitral relief), *with Al Raha Grp. for Tech. Servs., Inc. v. PKL Servs., Inc.*, No. 1:18-cv-04194-AT, 2019 WL 4267765 (N.D. Ga. Sept. 6, 2019) (refusing to review an emergency arbitrator order for lack of finality).

[21] ICC Report ¶ 206 n.170.

[22] ICC Report ¶ 187.

Enforcing International Arbitration Awards in US Courts

As discussed in detail in a January 2020 Skadden *Insights* article, recent U.S. court decisions demonstrate the relative ease of enforcing awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[23] However, U.S. courts are sensitive to cases where a purported foreign "award" appears not to be genuine and will refuse enforcement where serious questions exist.

This limit of the U.S. courts' pro-arbitration policy was recently demonstrated in *Al-Qarqani v. Chevron Corporation*.[24] In that case, Saudi Arabian nationals brought a petition in federal district court to recognize and enforce a purported arbitral award of approximately $18 billion that had been rendered against numerous individuals and companies under the auspices of the International Arbitration Centre in Cairo. In response to the petition, the U.S. respondents (two Chevron affiliates) argued that the award "was the product of sham proceedings." The district court focused on whether there was an arbitration clause between the Saudi individuals and the U.S. companies, noting that the sole basis for arbitration was a 1933 concession agreement between the government of Saudi Arabia and a Standard Oil affiliate. The Saudi claimants, however, had never been parties to the 1933 concession and, therefore, could not invoke the arbitration clause against Chevron. With no agreement to arbitrate, the court dismissed the petition for lack of jurisdiction.

Moreover, the district court added that even if there had been an agreement between the parties to arbitrate, the court still would have denied recognition, on the grounds that the composition of the tribunal had not been "in accordance with the agreement" and that the arbitral tribunal had decided matters outside the scope of the arbitration agreement.

Because of the unique facts involved, *Al-Qarqani* does not signal a trend against enforcement of commercial awards generally. Nevertheless, the case illustrates the basic threshold requirements that must be met in order to enforce a foreign arbitration award, including that the award must arise from a genuine arbitration agreement. Where there are questions about the integrity of the foreign arbitral proceeding, U.S. courts may decline to enforce the resulting award.

[23] As discussed in detail in the *Insights* article, such recent examples include *KG Schifffahrtsgesellschaft MS Pacific Winter MBH & Co. v. Safesea Transport, Inc.*, No. 19-4869 (CCC) (SCM), 2019 WL 4727941 (D.N.J. Sept. 26, 2019), and *De Rendon v. Ventura*, No. 17-24380-CIV-MORENO, 2018 WL 4496300, at *1 (S.D. Fla. Sept. 19, 2018), *appeal dismissed*, No. 18-14387 (11th Cir. Mar. 26, 2019).

[24] *Al-Qarqani v. Chevron Corp.*, No. C 18-03297 JSW, 2019 WL 4729467 (N.D. Cal. Sept. 24, 2019), *appeal docketed*, 19-17074 (9th Cir. Oct. 21, 2019).

Update on the United States-Mexico-Canada Agreement

On January 29, 2020, President Trump signed the United States-Mexico-Canada Agreement (USMCA) into law. The implementing legislation had been submitted to the U.S. Congress on December 17, 2019. Mexico previously ratified the USMCA in June 2019 by a vote of 114-4.

On March 13, 2020, the Canadian Parliament ratified the USMCA before taking a three-week break in response to the coronavirus. The U.S. Trade Representative notified Congress that the USMCA will enter into force on July 1.

Once the USMCA enters into force, the agreement will continue for a 16-year term unless it is renewed for an additional 16-year period.[25] The parties also will conduct a "joint review" on the sixth anniversary of the agreement entering into force.[26]

[25] *See* USMCA Art 34.7(3).

[26] *See* USMCA Art. 34.7(2).

IBA Arb-40 Reveals Guide on Technology Resources for Arbitration Practitioners

In September 2019, on the occasion of the International Bar Association (IBA) Annual Meeting in Seoul, the IBA Arb-40 Subcommittee, a subgroup of the IBA Arbitration Committee, unveiled *Technology Resources for Arbitration Practitioners*. The guide, which is available exclusively online, brings together a list of currently available technological advances that can assist in an international arbitration.

The resources listed in the guide include various categories of technology that can aid with tasks as diverse as management and transfer of arbitration data, presentation of graphics and evidence, translation and interpretation, document collection and review, and audio and video conferencing, among many others. The guide will be updated and amended as technology improves and changes over time, and will soon feature an updated section regarding the use of technology to conduct virtual hearings necessitated by the COVID-19 crisis.

Arbitration practitioners may find it useful to browse the categories available in the guide and review how the different technology resources listed there may be able to assist in making their arbitration more efficient, user-friendly and effective, particularly in the current environment, where travel and in-person gatherings have been severely restricted.

Helms-Burton Lawsuits: Recent Decisions Clarify the Statute's Limits as Claims Continue

As reported in our October 2019 client alert, Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (known as "Helms-Burton") creates a private right of action allowing certain U.S. nationals owning a claim to property confiscated by the Cuban government to claim damages against "any person that ... traffics in [such] property." [27] Title III of Helms-Burton allows claimants to collect the value of the confiscated property, plus treble damages and attorneys' fees.[28] Title III, which had lain dormant for more than two decades as it was suspended by successive U.S. administrations, was allowed by the Trump administration to go into effect in May 2019.

Since then, Helms-Burton lawsuits have been commenced in a variety of sectors, including banking and finance, tourism, oil and gas, and property development, all on the theory that the defendants, by doing business in Cuba, have trafficked in property confiscated from the plaintiffs. Generally, these cases have been brought in U.S. District Court for the Southern District of Florida, where many plaintiffs reside.

As discussed in our April 2020 memorandum, some case law already has begun to tackle the more difficult parts of Helms-Burton. One is the definition of "trafficking," which requires that a defendant "knowingly and intentionally" take prescribed actions with respect to confiscated property, including "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property." [29] One case in particular has focused on the pleading standards applicable when alleging that a defendant "knowingly" trafficked in property.

In *Gonzalez v. Amazon.com*,[30] a Cuban-American plaintiff accused an online retailer and an associated merchant of trafficking charcoal that had been produced on expropriated land once belonging to his family. It was alleged that these defendants knew that they trafficked in confiscated Cuban property because the charcoal was advertised as "Direct from Farmers in Cuba."[31] In March 2020, however, a Southern District of Florida judge dismissed the complaint with leave to replead, concluding that the mere fact that the charcoal sold was produced on Cuban farmland was not sufficient to "demonstrate that the defendants knew the property was confiscated by the Cuban government" or "that it was owned by a United States citizen."[32]

Gonzalez also focused on Helms-Burton's specific requirement that, for Castro-era expropriations, a plaintiff must have acquired ownership of the "claim" to confiscated property before March 12, 1996 (the date the statute was enacted).[33] In *Gonzalez*, the complaint alleged that the claim had been inherited from the original farmland owner, but "lack[ed] allegations regarding when Gonzalez inherited the claim from his grandfather, when Gonzalez became a United States citizen, if Gonzalez's grandfather was a United States citizen, and, if so, when Gonzalez's grandfather became a citizen." [34] After the complaint was dismissed in March, plaintiff filed an amended complaint with additional allegations concerning his inheritance of the claim, which occurred after successive transfers and, ultimately, a transfer of the claim to plaintiff by his mother sometime after November 2016. On May 11, 2020, the court again dismissed the complaint — now with prejudice — on the basis that the plain language of the statute does not permit plaintiffs "who acquired an interest in confiscated property after 1996 to bring Helms-Burton Act claims if their property was confiscated before March 12, 1996."[35]

Helms-Burton case law is still in its early stages, and the claims arising under the statute have yet to be examined at the federal appellate level. Even at this point, however, the *Gonzalez* opinion demonstrates that plaintiffs seeking to establish a "trafficking" claim should be prepared to plausibly show that the defendant actually knew it was trading in confiscated property that had once been owned by a U.S. citizen. It also serves as a reminder that Helms-Burton plaintiffs will face the hurdle posed by the statutory March 12, 1996, cut-off date for acquiring claims to such property. Given the time that has elapsed since then, this may prove an obstacle to some cases.

[27] 22 U.S.C. § 6082(a)(1)(A).

[28] 22 U.S.C. § 6082(a).

[29] 22 U.S.C. § 6023(13)(A).

[30] *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-CIV, 2020 WL 1169125, at *1 (S.D. Fla. Mar. 11, 2020

[31] *Id.*

[32] *Id.* at *2.

[33] 22 U.S.C. § 6082(a)(4)(B).

[34] *Gonzalez* at *2.

[35] *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-CIV, 2020 WL 2323032, at *2 (S.D. Fla. May 11, 2020).

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