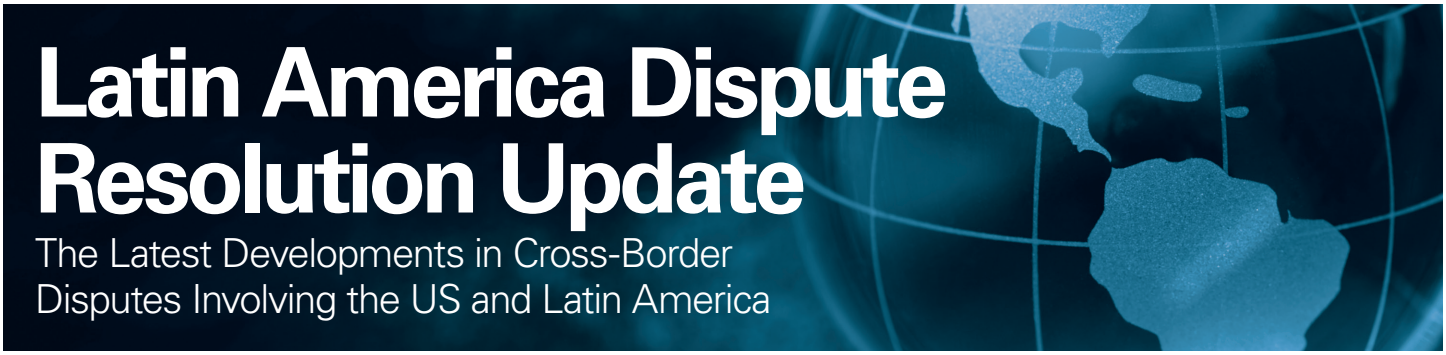
Skadden

Latin America Dispute Resolution Update

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



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COVID-19's Impact on M&A Transactions and Material Adverse Effect Clauses

The COVID-19 pandemic has given rise to many M&A-related disputes. By some estimates, over 3,000 commercial cases were filed in U.S. federal courts alone as a result of the COVID-19 crisis. This figure does not account for numerous COVID-related disputes that were filed in U.S. state courts. Given that many transactions involving Latin American parties incorporate New York law or are based on provisions developed under New York law, these decisions may be of particular interest to companies doing business in Latin America.

In a number of the cases, the dispute turns on a provision common to M&A transactions, namely the material adverse event or effect (MAE) clause (sometimes referred to as the material adverse change (MAC) clause). An MAE/MAC clause, subject to its specific terms, may excuse a buyer from its obligation to close where the seller experiences a significant change in condition after signing and before closing.

The proliferation of COVID-related MAE/MAC disputes has generated filings not only in New York and Delaware, but also in other commercial centers such as Michigan and California. The cases span a wide variety of industries, including real estate, telecommunications, software, travel and hospitality, and fitness.

Certain MAE/MAC-related disputes have settled before being adjudicated by the courts, including the dispute between Tiffany & Co. and LVMH Moet Hennessy-Louis Vuitton SE, and one between L Brands, Inc. (the owner of Victoria's Secret) and SP VS Buyer LP (in both instances, before the Delaware Chancery Court). Of the cases that have been resolved by North American courts recently — *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC* (November 30, 2020 (Delaware Court of Chancery)) and *Fairstone Financial Holdings Inc. v. Duo Bank of Canada* (December 2, 2020 (Ontario Superior Court of Justice)) — the courts carefully examined the specific terms of an MAE/MAC clause to analyze its applicability, including the circumstances that expressly are "carved out" of qualifying as an MAE/MAC, and those that are "carved in."

One example of this is whether an MAE/MAC clause expressly references "pandemics" or other public health emergencies. Notably, in an informal survey of approximately 51 publicly available M&A agreements for U.S.-based and international transactions with an equity value of $100 million or more, signed between January and April 2020, fewer than half of the agreements expressly carved pandemics, epidemics or other disease-related

events out of the definition of what qualifies as an MAE/MAC. Of the agreements that contained such a carve-out, the majority contained language that potentially carved back into the definition of MAE/MAC circumstances where the pandemic disproportionately affected the selling entity.

Given the wide variation among MAE/MAC clauses, including in the cases pending in the U.S. courts, litigants eagerly await the courts' interpretations to see what clear trends emerge, if any.

The Impact of COVID-19 on Construction and Infrastructure Projects

On January 14, 2021, Skadden and BDO Consulting co-hosted a webinar discussing the impacts of COVID-19 on complex construction projects. The program explored the perspectives of owners and contractors with direct experience addressing the impacts of COVID-19 on their projects.

Generally speaking, construction projects have been impacted during the pandemic by: (i) government-mandated shut down periods; (ii) new safety requirements and protocols, including PPE, reductions in work crews, limitations on work hours and closed/restricted site access; (iii) supply chain interruptions; (iv) delays in permitting and other government agency responses; (v) labor restrictions, labor shortages and travel restrictions impeding the ability of laborers to get to worksites; and (vi) difficulties associated with teleworking in a live construction environment. The webinar provided examples of how owners and contractors have attempted to calculate the impact of these changes on their projects, which may include delays in the as-built schedule, changes in productivity, and escalating labor and material costs, among other results.

From a legal perspective, the ramifications of these events are still playing out, and likely will not be resolved for some time. Anecdotal evidence suggests that *force majeure* has been only rarely invoked in connection with construction projects, and in those cases where it has been invoked, limited to the period of mandated government shutdown and/or direct supply unavailability as a result of the pandemic. The limited use of such clauses may be due to the fact that *force majeure* clauses in construction contracts typically extend the time for project completion (which owners do not favor) and require each party to bear its own costs during the *force majeure* event (which contractors do not favor).

The companies surveyed suggested that owners and contractors generally have been able to agree on limited time extensions to provide some pandemic-related relief, but whether these time extensions will be sufficient given the ongoing conditions and whether parties can agree on further extensions remains unclear. As disputes arise over the sufficiency of time extensions, those charged with resolving them will need to grapple with whether contractors should be required to mitigate consequences for owners or accelerate work plans to compensate for lost time, whether there is an obligation to use contract "float" to offset pandemic effects, and whether the causes of project delays are linked to the pandemic as opposed to other construction or supply issues, among many possible issues.

The experience of those surveyed also suggests that no agreement has yet been reached on who will bear the costs of productivity impacts on construction projects. Clear and robust documentation segregating productivity impacts that can be linked to the pandemic from other, nonpandemic impacts will be critical in establishing entitlement. Early planning is critical in the context of construction disputes in order to ensure an ample legal record in the event of a later dispute.

In addition to COVID-19's ongoing impacts on current construction projects, the impacts of the pandemic are already having an effect on contract negotiations going forward. Owners are generally willing in new construction and equipment supply contracts to provide schedule and sometimes cost relief for COVID-19 impacts that are the direct result of a legal requirement. The issues debated in the contract negotiation focus on whether such relief extends to impacts of COVID-19 that are not the result of a legal requirement, such as supply chain issues or labor shortages. The general position of the owners is that, nearly a year into the pandemic, supply chain and labor issues are not as problematic and contractors should be able to price in those risks. Owners and/or lenders may also ask contractors for transparency regarding impacts to date and planning for impacts going forward. Contractors, on the other hand, are pressing for a broader COVID-19 schedule, and if possible, cost relief. To the extent they are unsuccessful, they may try to increase lump sum or unit-based costs to reflect the added pandemic uncertainties.

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US Court Decision of Interest: US Supreme Court To Weigh In on Use of Section 1782 for Commercial Arbitration

As previously discussed in our October 2019 newsletter, a U.S. statute known as 28 U.S.C. § 1782 (Section 1782) permits U.S. federal district courts to require a party to provide evidence for use in proceedings before "foreign or international tribunals." This allows U.S.-style discovery (including documentary subpoenas and/or depositions) to be used in aid of foreign proceedings. Relief may be granted by a federal district court against any subpoena target (corporate or individual) that is "found" in its district.

Historically, Section 1782 was often used as a means of obtaining evidence in aid of foreign court proceedings. In the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Court held that Section 1782 discovery can also be sought in aid of certain nonjudicial proceedings (in that case, competition investigations conducted by a EU regulator).

In expanding the reach of Section 1782 to investigative proceedings, the *Intel* decision also prompted debate on whether Section 1782 may be used to compel discovery for use in private commercial arbitrations abroad. Over the next decade and a half, this issue was vigorously debated, with numerous U.S. district courts reaching different conclusions on the issue (and some holding that the determination depended on the precise nature of the foreign arbitral institution in question). In recent years, the federal appellate courts have weighed in. Prior to 2020, the Sixth Circuit held that Section 1782 may be used for international commercial arbitrations seated abroad, while the Second and Fifth Circuits reaffirmed their position (expressed before *Intel*) that the statute is not available for use in connection with commercial arbitrations.

In 2020, three other circuits were confronted with the issue. Two of the cases relate to an arbitration seated in London between Rolls-Royce and Servotronics. The arbitration is pending under the auspices of the Chartered Institute of Arbitrators (CIArb). In 2019, Servotronics obtained and served Section 1782 subpoenas against certain persons/entities in both South Carolina and Chicago. In a March 2020 decision regarding the South Carolina subpoena, the Fourth Circuit held that Section 1782 could validly be used to obtain discovery in aid of the CIArb arbitration. In September 2020, however, the Seventh Circuit reached exactly the opposite conclusion and affirmed the district court's order quashing the subpoenas.

On December 7, 2020, the party seeking Section 1782 discovery in *Servotronics* filed a petition for *certiorari*, arguing that the question of Section 1782's scope and its applicability to international arbitration is ripe for the Supreme Court's consideration, pointing to the present circuit split among the U.S. courts of appeals.[1] Rolls-Royce and Boeing have yet to respond to the petition, and briefing was extended until February 2021, meaning the Supreme Court has not yet decided on the *certiorari* petition (*i.e.*, whether to permit the appeal to be brought) until at the time of this publication. The Supreme Court rejected Servotronics's request to accelerate briefing, with Servotronics warning that the petition could become moot given that the CIArb hearing is currently scheduled to occur in London in April 2021.

Meanwhile, in September 2020 (the same month that the Seventh Circuit rendered a decision in *Servotronics*), the Ninth Circuit heard oral argument in *HRC-Hainan Holding Co., LLC v. Yihan Hu* on whether Section 1782 can be used to issue subpoenas in aid of an arbitration before the China International Economic Trade Arbitration Commission (CIETAC) in Beijing. The United States District Court for the Northern District of California held that Section 1782 authorized discovery in aid of the CIETAC arbitration and a related Chinese court proceeding. On appeal, the subpoena targets have argued that CIETAC proceedings are not a "foreign or international tribunal," while the appellants have relied on the Seventh Circuit *Servotronics* case in support of their position.

Should the Supreme Court grant *certiorari* in *Servotronics*, the Court will potentially resolve a significant question about Section 1782's applicability. Even if that does not occur, the pending *HRC-Hainan* appeal in the Ninth Circuit may clarify the issue for West Coast litigants.

[1] *Servotronics Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794 (U.S.)

Percolating Challenges to Class Arbitration in Brazil

The Brazilian Corporations Act was amended in 2001 to allow corporations to include arbitration clauses in their bylaws for the settlement of disputes among (i) shareholders and a corporation (including directors and officers) or (ii) controlling shareholders and minority shareholders.[1] In 2015, under the framework of the general reform of the Brazilian Arbitration Act, the Corporations Act was again amended to confirm that the inclusion of an arbitration clause in a company's bylaws binds all shareholders, granting dissenting minority shareholders the right to withdraw from the corporation with reimbursement for the value of their shares.[2] Thus, corporations may adopt mandatory arbitration for resolution of all disputes brought by shareholders, and indeed many large Brazilian corporations have done so.[3]

[1] Federal Law No. 6.404 of December 15, 1976, Article 109, §3, as amended by Federal Law No. 10.303 of October 31, 2001.

[2] *Id.* at Article 136-A, as amended by Federal Law No. 13.129 of May 26, 2015.

[3] Certain special listing segments of the Brazilian Stock Exchange, which impose higher corporate governance standards, affirmatively require corporations to adopt arbitration clauses.

Since the amendment in 2015, however, debate has increased over the viability of "class arbitration" to resolve shareholder disputes. While litigation on behalf of a class of affected shareholders is recognized, no express provision under Brazilian law authorizes shareholders to seek redress as a class through arbitration.

Although specific statutes govern class actions related to the stock market,[4] the class action system has been primarily used in connection with environmental and consumer law matters. Moreover, arbitral institutions within Brazil lack specific sets of rules for class arbitration, which introduces practical hurdles to the process, such as a lack of criteria for deciding who the leading plaintiff would be, whether the class arbitration would function on an opt-in or opt-out basis, and how to deal with absent class members.

These issues are being tested as certain groups of minority shareholders and investors have commenced arbitrations — all of which are still pending — seeking redress as a class against major Brazilian corporations. The claims are being brought by representative entities before the *Câmara de Arbitragem do Mercado* (Market Arbitration Chamber), which is the mandatory arbitral institution for disputes involving companies listed in certain special segments of the Brazilian Stock Exchange. These arbitrations are confidential, and the current status of the arbitral tribunal's acceptance of jurisdiction is not known. However, ancillary litigation could bring the proceedings to light.

[4] Federal Law No. 7.913 of December 7, 1989, is one example.

US Enacts Comprehensive Anti-Money Laundering and Counterterrorist Financing Legislation

On January 1, 2021, the United States Congress enacted the National Defense Authorization Act, which includes the Anti-Money Laundering Act of 2020, the Corporate Transparency Act, the Combating Russian Money Laundering Act and the Kleptocracy Asset Recovery Rewards Act, sweeping provisions intended to modernize the anti-money laundering and counter-terrorist financing laws in the United States. Among other key changes, these statutes expand the authority of the Treasury and Justice Departments to subpoena records from foreign banks with U.S. correspondent accounts, establish more robust whistleblower programs to address money laundering and corruption, impose new beneficial ownership reporting requirements on U.S. companies, incorporate virtual currencies and other emerging payment methods within the U.S. anti-money laundering legal framework, and direct studies aimed toward increasing the effectiveness of currency transaction and suspicious activity reporting requirements. Please refer to our January 7, 2021, alert for a detailed discussion of these changes.

US Court Decision of Interest: US Supreme Court Avoids a Second 'Arbitrability' Dispute

In our October 2019 newsletter, we discussed the U.S. Supreme Court's decision in the *Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Schein I*) case where the Court affirmed the principle that parties may choose in their contracts to delegate threshold questions of arbitrability to the subsequent arbitrators, and courts must respect and uphold that choice and allow arbitrators to decide questions of arbitrability, even where the court believes that a claim that the dispute is arbitrable is "wholly groundless." In *Schein I*, the Court remanded the case to the lower courts with that guidance.

The lower courts then considered a new argument: that the contract expressly required the courts, rather than the arbitrators, to rule on any injunctive relief application, and that this carve-out from arbitration meant that the parties had not "clearly and unmistakably" delegated the issue of arbitrability to the arbitrators. The Fifth Circuit agreed and held that the courts need not refer to an arbitration tribunal the question of whether claims for injunctive relief were arbitrable. The Supreme Court granted *certiorari* in *Schein II* in order to review that decision. The issue to be decided by the Court is whether a provision in a contract that exempts certain claims from arbitration is "itself a question of arbitrability" that must be resolved by the arbitrators.

On December 8, 2020, the Court heard oral argument, and a decision was expected sometime in 2021. However, on January 25, 2021, in an unexpected turn of events, the Court overturned its original grant of *certiorari* as "improvident," ending its consideration of the dispute. That same day, the Court refused to hear the Sixth Circuit's decision in *Blanton v. Domino's Pizza Franchising LLC*, which held that a contractual cross-reference to the American Arbitration Association (AAA) Rules was sufficient to delegate arbitrability questions to an arbitrator. Practitioners and judges therefore will not receive further guidance from the Court anytime soon as to how they should approach the thorny question of "who decides" matters of arbitrability.

The *Schein* arbitration clause provided that "any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property ...) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Splitting substantive claims and relief between litigation and arbitration like this generated nearly a decade of litigation, all surrounding "threshold" questions of arbitrability. The *Schein* saga serves an important reminder to litigants that they should not split merits issues between courts and arbitration (in order to avoid parallel proceedings) and should explicitly delegate questions of arbitrability to the arbitrator.

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ICC Updates Arbitration Rules

The International Chamber of Commerce (ICC) has released amendments to its Rules of Arbitration[5] which will apply to arbitration agreements signed after January 1, 2021, that incorporate ICC rules. The ICC has explained that "[s]ome of the 2021 amendments reflect established practice of the Court while others aim at increasing the flexibility, efficiency and transparency of ICC Arbitrations."[6] Some of the major changes include:

Remote Hearings: The new rules make explicit that a tribunal, after consulting with the parties and considering all relevant circumstances, may decide whether to hold a hearing in person or remotely by videoconference, telephone or other means.[7]

Third-Party Funding: Under the new rules, a party must inform the Secretariat of the ICC, the tribunal and the other parties of the existence of a third-party funding arrangement. The rule states that the purpose of this requirement is "to assist prospective arbitrators and arbitrators in complying with their duties" of independence and impartiality, as the existence of a third-party funder may present a conflict for an arbitrator.[8]

Appointment of Arbitrators: In "exceptional circumstances ... to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award,"[9] the new rules permit the ICC to appoint a member of the tribunal or the entire tribunal. The ICC may invoke this right "[n]otwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal." Although this exception is unlikely to arise with great frequency, it grants significant authority to the ICC.

Changes in Party Representation: Under the new rules, an already constituted tribunal may exclude a new party representative from the proceeding, either in whole or in part, if inclusion presents a conflict of interest for an arbitrator.[10]

Consolidation: The new rules clarify that cases may be consolidated even if they involve more than one arbitration agreement, noting that consolidation is possible if "all of the claims in the arbitrations are made under the same arbitration agreement or agreements."[11] As in the current rules, a tribunal "may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed," in deciding whether to consolidate.[12]

Joinder: The new rules also offer an alternative path for joinder of an additional party to an arbitration. Under the current rules, joinder after any arbitrator had been appointed or confirmed was permissible only if all parties agreed. Under the 2021 rules, a tribunal has discretion to allow joinder if the additional party accepts the constitution of the tribunal and agrees to the terms of reference. In making a decision on joinder, the tribunal "shall take into account all relevant circumstances," including jurisdiction, timing, conflicts of interest and procedural posture.[13]

Emergency and Expedited Procedures: Under the new rules, cases with a value of less than $3 million will be subject to expedited procedures on an opt-out basis. This amendment increases the current threshold of $2 million.[14]

[5] The updated rules (ICC Rules (2021)) are available on the ICC's website.

[6] ICC Rules (2021) Foreward.

[7] ICC Rules (2021) Article 26.

[8] ICC Rules (2021) Article 11(7).

[9] ICC Rules (2021) Article 12(9).

[10] ICC Rules (2021) Article 17.

[11] ICC Rules (2021) Article 10. This is an amendment to the current rules which use only the singular "agreement."

[12] ICC Rules (2021) Article 10.

[13] ICC Rules (2021) Article 7(5).

[14] ICC Rules (2021) App'x. VI, Article 1(2).

The Hague Launches Rules on Business and Human Rights

The United Nations Global Compact's Human Rights Principles (the UN Global Compact) describes itself as "[a] call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals."[15] Over the last four years, the average participant growth rate in the UN Global Compact in Latin America and the Caribbean has exceeded the global average, and the region represents the second largest total number of participants after Europe.[16]

In furtherance of the UN Global Compact, on December 12, 2019, the Business and Human Rights Arbitration Working Group of the Center for International Legal Cooperation (CILC)

[15] https://www.unglobalcompact.org/what-is-gc.

[16] http://www.unglobalcompact.org/engage-locally/latin-america.

launched the Hague Rules on Business and Human Rights (the Hague Rules).[17] These rules tailor the Arbitral Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) specifically for the "arbitration of disputes related to the impact of business activities on human rights."[18] According to the CILC, such arbitration is designed for disputes between "multinational business enterprises (MNEs) and the victims of human rights abuse linked to MNEs" and "can serve [as] a useful tool to assist MNEs to prevent abuse from occurring in their supply chains and development projects."[19]

The Hague Rules differ from the UNCITRAL Rules in several important respects. For example, they incorporate flexibility to adapt to the different contexts in which stakeholders (*e.g.*, individuals, NGOs, labor unions, businesses and states) may consent to resolve human rights disputes through arbitration. Stakeholders may designate the Hague Rules in their contracts, agreements or other instruments to resolve human rights disputes. They may also adopt the Hague Rules after a dispute, such as a complex mass tort dispute, has arisen, and the rules contemplate the possibility of an arbitration where numerous claimants aggregate their claims.[20] An Annex to the Hague Rules includes model clauses for both scenarios.

In addition, the Hague Rules provide for heightened transparency of arbitral proceedings and awards, and also provide that the arbitrators have expertise in business and human rights matters.[21]

[17] *See* Center for International Legal Cooperation, "Launch of the Hague Rules on Business and Human Rights Arbitration," Dec. 10, 2019; The Hague Rules on Business and Human Rights Arbitration.

[18] Hague Rules, Introductory note.

[19] https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/.

[20] *See* Hague Rules, Article 19.

[21] Hague Rules, Article 11(c); *id.* p. 95.

IBA Arb-40 Subcommittee Publishes Virtual Hearing Guide

The IBA Arb-40 Subcommittee has published Technology Tools to Support Virtual Arbitrations, which is an online guide of available resources for conducting virtual hearings. The guide, which was issued under the umbrella of the IBA Arb-40 Subcommittee's broader Technology Resources for Arbitration Practitioners guidance, aims to provide practitioners with three categories of resources that may be used to plan and conduct virtual arbitration hearings: (i) videoconferencing platforms, including those that offer unique hearing-related features; (ii) remote interpretation and translation services; and (iii) services provided by arbitral institutions in support of virtual hearings.

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