

Latin America Dispute Resolution Update

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

- 1 US Supreme Court Issues Trio of Arbitration Decisions
- 2 Helms-Burton Act Gives Rise to Risk of Lawsuits for Businesses With Cuba Ties
- 3 US Courts Continue To Consider Availability of Section 1782 Discovery for Use in International Arbitration
- 4 Rival Venezuelan Governments Appear in US Arbitration Enforcement Proceedings
- 5 US Courts May Require Production of Information From Messaging Apps

US Supreme Court Issues Trio of Arbitration Decisions

During its 2018-19 term, the U.S. Supreme Court issued decisions in three cases involving arbitration matters. These decisions, discussed further in our [September 26, 2019, client alert](#), may have important implications for participants involved in international arbitration proceedings seated in the U.S.

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*,¹ the Court weighed in on an issue that has been heavily litigated in the U.S.: Who should decide the “gateway” question as to whether a dispute must be arbitrated — the courts or the arbitrators? Under existing U.S. case law, it is well established that parties may choose in their contract to delegate threshold questions of arbitrability to the arbitrators, and courts must respect and uphold that choice. In *Henry Schein*, the Court held that U.S. courts must uphold the written language of an arbitration agreement sending gateway questions to the arbitrators, even where the court considers the argument that the matter is arbitrable to be “wholly groundless.” The Court held that U.S. arbitral law recognizes no such “wholly groundless” exception, and that courts must always respect the parties’ choice to submit threshold questions of arbitrability to the arbitrator, regardless of its own views as to whether the dispute is truly arbitrable.

Henry Schein is the latest in a series of Supreme Court decisions that affirm the ability of arbitrators to decide a variety of issues that relate to the “arbitrability” of a dispute. It has already been relied upon in a number of cases before U.S. district courts.

In another decision, *New Prime Inc. v. Oliveira*,² the Supreme Court held in an 8-0 decision that a U.S. court, rather than the arbitrator, must decide whether a contract falls within the statutory exemptions to arbitration as set forth in Section 1 of the Federal Arbitration Act (FAA). In this regard, Section 1 of the FAA exempts “seamen, railroad workers, and other employees engaged in foreign or international commerce” from its provisions. The Court found that the applicability of this exemption must be decided by the courts, regardless of whether the contract might

¹ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

² *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

Latin America Dispute Resolution Update

Helms-Burton Act Gives Rise to Risk of Lawsuits for Businesses With Cuba Ties

In May 2019, the Trump administration sought to make available a private cause of action allowing U.S. nationals to sue persons and entities that “traffic” in property expropriated by the Cuban government. (See our [May 9, 2019, client alert](#).) The private right of action is available under Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act).¹

Originally enacted in 1996 at a time of increased tension between the U.S. and Cuban governments, the Helms-Burton Act provided for a range of measures against the Castro government of Cuba. Certain parts of the Helms-Burton Act have been operative since 1996.

Title III of the Helms-Burton Act, however, lay dormant until May 2019. Title III purports to create a private right of action for U.S. nationals who “own the claim” to “property” “confiscated” by the Cuban government. According to the statute, such plaintiffs may seek damages against persons who “traffic[]” in the confiscated property.² In this respect:

- The statutory definition of “trafficking” potentially covers a broad range of

commercial activities, subject to certain exceptions. It is also subject to a requirement that the trafficking be knowing and intentional.

- According to the statute, damages in a Title III action will be the greater of the (i) fair market value of the confiscated property at the time of taking plus interest; (ii) current market value; or (iii) the amount certified by the U.S. Foreign Claims Settlement Commission (FCSC) (if the FCSC previously certified a plaintiff’s claim pursuant to the International Claims Settlement Act of 1949).³
- Plaintiffs are likely also to point to a feature of the statute that purportedly allows for damages to be trebled in cases where a defendant has been on specific notice that it is trafficking in property and fails to cease doing so within 30 days.⁴

The Helms-Burton Act, and Title III in particular, caused immediate controversy when enacted, both within and outside the United States. Part of the act empowered the U.S. president to suspend the private right of action in Title III. In August 1996, before the act even took effect, President Bill Clinton exercised this power, and subsequent administrations took a similar position. Consequently, Title III’s right of action was continuously suspended for over 23 years.

In April 2019, however, U.S. Secretary of State Mike Pompeo announced that the suspension of Title III would cease effective May 2, 2019.

In the subsequent months, various plaintiffs have filed lawsuits under Title III against a variety of U.S. and foreign corporate defendants, on the theory that the plaintiffs “own the claim” to property confiscated by the Castro government — and that the defendants, by engaging in business activities connected with Cuba, have “trafficked” in “confiscated” property. More Title III lawsuits could be filed over the next few months or years.

Much of the litigation to date is proceeding in the U.S. District Court for the Southern District of Florida against defendants that are not affiliated with the Cuban government but are alleged to have “trafficked” in “confiscated property” for purposes of the act. At present, no defendant has been held liable under such a theory, and no appellate court has yet considered the viability of a Title III lawsuit in such circumstances. Indeed, Title III raises a variety of jurisdictional, statutory and constitutional issues, all of which will be explored further as the current litigation unfolds.

In the meantime, given the potentially significant exposure that plaintiff groups are currently seeking to impose with respect to Title III, companies with links to Cuba may wish to review their Cuba-related activities.

¹ 22 U.S.C. §§ 6021-609.

² 22 U.S.C. § 6082(a)(1).

³ 22 U.S.C. § 6082(a)(1).

⁴ 22 U.S.C. § 6082(a)(3)(B)-(C).

otherwise be construed as referring questions of arbitrability to the arbitrators. According to the Supreme Court, before courts can invoke the FAA’s powers “to stay litigation and compel arbitration according to a contract’s terms,” they “must first know whether the contract itself falls within or beyond the boundaries” of the FAA.³

Finally, in *Lamps Plus, Inc. v. Varela*,⁴ the Court returned to an issue that has created controversy in the past — namely, the ability of a “class” of aggrieved claimants to seek arbitration. This form of arbitration has attracted interest from consumers and other claimants seeking to arbitrate antitrust and similar griev-

ances against corporate respondents. Such claimants typically argue that, even though they are party to contracts that contain arbitration clauses, their particular claims cannot be litigated efficiently without the ability to pursue them on a classwide basis.

The availability of “class” arbitration was significantly narrowed by the Supreme Court’s 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*⁵ In that case, the Court held that, because arbitration is a creature of “consent” between the parties, “class arbitration” is not appropriate and may not be ordered unless it is expressly permitted by the language of the arbitration agreement in any one case. Mere silence on the issue, the Court held, could not be taken as consent by the parties to class arbitration.

³ *New Prime Inc.*, 139 S. Ct. at 537.

⁴ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

⁵ 559 U.S. 662 (2010).

Latin America Dispute Resolution Update

In *Lamps Plus*, the Court returned to this issue in an employment context. The claimant in that case, Frank Varela, was an employee of a California company whose tax records were hacked. As a result, Varela became the victim of identity theft, and a false tax return was filed on his behalf. Because his employment contract contained an arbitration clause, Varela filed a putative class arbitration action against his employer and all similarly situated employees whose tax information had been compromised. Both the federal district court and the U.S. Court of Appeals for the Ninth Circuit held that class arbitration was appropriate on the basis that the arbitration clause was ambiguous, but that any ambiguity needed to be construed against the employer.

The Supreme Court granted *certiorari* on the issue of whether class arbitration may be ordered based on a state law interpretive principle construing ambiguous arbitration clauses against their drafters. In other words, if the drafter of the arbitration clause

was not clear that classwide arbitration is precluded, should the claimants be permitted to make claims on behalf of a class by contending that the ambiguity should be construed against the drafter? By a 5-4 vote, the Court rejected that notion, reasoning that ambiguity “does not provide a sufficient basis to conclude that parties to an arbitration agreement” would have agreed to class arbitration.⁶ The court noted in particular that ambiguity is insufficient given that class arbitration sacrifices “the principal advantage of arbitration” — its speed and efficiency.

The Supreme Court holding is in many respects a reaffirmation of *Stolt-Nielsen’s* critical position towards class arbitration. Nevertheless, the closeness of the vote among the justices, and the reaction of outside commentators, suggest that the public debate over class arbitration is likely to continue.

⁶ *Lamps Plus, Inc.*, 139 S. Ct. at 1416.

US Courts Continue To Consider Availability of Section 1782 Discovery for Use in International Arbitration

As previously reported in this newsletter, a U.S. statute known as “Section 1782” permits U.S. courts to require a party to provide evidence in aid of proceedings before “foreign or international tribunals.”⁷ Such relief may be requested by any person “interested” in the foreign/international proceedings and can take the form of pretrial subpoenas or depositions. Relief can be ordered against any person or entity that “resides in or is found” within the district of the federal district court in which the application is made.

In the past several months, U.S. courts have issued several decisions relating to the scope of this statute. In October 2019, the U.S. Court of Appeals for the Second Circuit issued a decision holding that the statute’s application to those “found” in the district is co-extensive with the limits of personal jurisdiction.⁸ In other words, where a U.S. federal court would have personal jurisdiction over a party, that party can be “found” in the district for the purposes of Section 1782. The court further held that Section 1782 may be used to reach documents of a party found in the district, even where those documents are physically located outside the United States. The Second Circuit cautioned that courts may wish to exercise discretion in deciding whether to permit discovery of evidence abroad but made clear that the extraterritoriality of the documents should not itself be a bar to discovery.

⁷ 28 U.S.C. § 1782.

⁸ *In re Application of Antonio del Valle Ruiz and Others*, 939 F.3d 520 (2d Cir. 2019).

Several other recent decisions have discussed the issue of whether a foreign arbitration tribunal can be viewed as a “foreign or international tribunal” for purposes of Section 1782, *i.e.*, whether a U.S. court can order discovery in aid of a foreign arbitration proceeding. In the past, some courts (including the Second Circuit) have rejected this position. In its 1999 decision in *NBC v. Bear Stearns*,⁹ for example, the Second Circuit held that “an arbitral body established by private parties” was not a “foreign or international tribunal” for purposes of Section 1782.

In 2004, however, the U.S. Supreme Court construed Section 1782 for the first time in *Intel Corp. v. Advanced Micro Devices, Inc.*¹⁰ While that case did not concern arbitration, in finding that a European investigative proceeding could be viewed as “foreign or international tribunal,” the Supreme Court made comments about the scope of Section 1782 that (in the view of some) opened the possibility that U.S. courts might have power to grant discovery in aid of foreign arbitrations.

The Second Circuit has not addressed the issue since the Supreme Court issued its decision in *Intel*, although it may soon have the opportunity. Since 2004, some district courts within the Second Circuit have issued decisions that appear to favor the view that Section 1782 indeed is available in aid of foreign arbitration. For example, in its 2016 decision in *In re Ex Parte Application of Kleimar N.V.* (reported in our [June 2017 issue](#)), a

⁹ 165 F.3d 184, 191 (2d Cir. 1999).

¹⁰ 542 U.S. 241 (2004).

Latin America Dispute Resolution Update

judge of the U.S. District Court for the Southern District of New York held that discovery was available under the statute for use in a foreign private commercial arbitration.¹¹ Similar holdings have been made in some other U.S. jurisdictions.¹²

More recently, however, two judges of the SDNY have disagreed with this proposition and instead have followed the Second Circuit's *NBC* holding that discovery under Section 1782 is not available for use in a foreign commercial arbitration among private parties, even after *Intel*.

In the first of these cases, *In re Hanwei Guo*,¹³ Judge Jesse M. Furman held that the China International Economic and Trade Arbitration Commission does not qualify as a "foreign or international tribunal." He acknowledged that other SDNY decisions had declined to follow *NBC* but concluded that existing Second Circuit precedent must be followed unless it is overruled.

In the second of these cases, *In re Petrobras Securities Litigation*,¹⁴ Judge Jed S. Rakoff of the SDNY rejected efforts to obtain discovery in aid of a Brazilian arbitration against Petrobras. He held that Section 1782 does not permit U.S. discovery to be used in a private arbitration in a foreign country, reasoning that arbitral bodies established by private parties do not constitute a "foreign or international tribunal." While acknowledging that other district courts had reached a contrary view, he reached a similar conclusion as Judge Furman in *Guo*.

Guo is under appeal, and the Second Circuit will have an opportunity to address whether Section 1782 should apply to commercial arbitration proceedings.

¹¹ 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016).

¹² See, e.g., *In re Application of Owl Shipping, LLC*, No. 14-5655 (AET) (DEA), 2014 WL 5320192, at *2 (D.N.J. Oct. 17, 2014) (permitting discovery under Section 1782 for proceeding before London Maritime Arbitrators Association); *OJSC Ukrmafna v. Carpaty Petroleum Corp.*, No. 3:09 MC 265 JBA, 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (Stockholm Chamber of Commerce proceedings under the UNCITRAL Arbitration Rules); *In re Application of Babcock Borsig A.G.*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) (ICC-administered arbitration in Dusseldorf).

¹³ No. 18 MC 561, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019).

¹⁴ 393 F. Supp. 3d 376 (S.D.N.Y. 2019).

Rival Venezuelan Governments Appear in US Arbitration Enforcement Proceedings

Since Juan Guaidó declared himself the interim president of Venezuela on January 23, 2019, he has been recognized by nearly every nation in the Americas as Venezuela's legitimate president and has appeared in or sought to intervene in at least two cases pending in U.S. courts involving enforcement of international arbitral awards issued against Venezuela. In both cases, U.S. federal appellate courts recognized Guaidó's authority to speak and act on behalf of Venezuela, based on the decision of the executive branch of the U.S. government to recognize Guaidó as the legitimate president of Venezuela.

In *Rusoro Mining Ltd. v. Venezuela*,¹ the law firm representing the Republic of Venezuela, which had been taking instruction from the Maduro administration, began taking instruction from Guaidó's government after the U.S. State Department recognized Guaidó as the legitimate president. A new law firm that had been instructed by the Maduro administration appeared and then withdrew from the litigation, so the attorney general for the Maduro administration himself filed a notice of appearance in the case. Guaidó's administration filed a motion to strike the attorney general's notice of appearance, arguing that permitting Maduro's attorney general to appear in U.S. courts would acknowledge Maduro's government as legitimate and would encroach on the exclusive authority of the executive branch of the U.S. government to determine foreign policy. In response, the Maduro administration disputed Guaidó's claim to the presidency, challenging, among other things, its legitimacy under Venezuelan law. The U.S. Court of Appeals for the District of Columbia Circuit denied the Maduro administration's request to bar the Guaidó administration from arguing the appeal on behalf of Venezuela, noting that government recognition is a political rather than judicial question.

In *Crystallex Int'l Corp. v. Venezuela*,² the Maduro administration did not formally challenge Guaidó's ability to appear. There, Venezuela had not yet appeared in the litigation, which was proceeding between Crystallex and Petróleos de Venezuela, S.A. (PDVSA). At the time, the State Department recognized the Guaidó administration. The Guaidó administration then filed an appearance on behalf of Venezuela to intervene in PDVSA's appeal before the U.S. Court of Appeals for the Third Circuit. The Third Circuit granted the request and "recognize[d] Guaidó's regime as authorized to speak and act on behalf of Venezuela in these appeals."

In recognizing Guaidó's exclusive authority to appear on behalf of Venezuela, both courts relied on the U.S. Supreme Court's decision in *Guaranty Trust Co. v. United States*,³ which held that the executive branch's "action in recognizing a foreign government ... is conclusive on all domestic courts, which are bound to accept that determination." Accordingly, because the executive branch of the U.S. government has recognized Guaidó as the legitimate president of Venezuela, U.S. courts will follow suit, recognizing Guaidó's exclusive ability to represent Venezuela in U.S. litigation.

The full impact of the dispute between the Guaidó and Maduro administrations, and its effect on legal rights involving Venezuela, remains to be determined over time. If the dispute lingers for a significant period, it may present further challenges for parties doing business with Venezuela.

¹ No. 18-7044, Doc. No. 1785518 (D.C. Cir. May 1, 2019).

² 932 F. 3d 126 (3d Cir. 2019).

³ 304 U.S. 126, 137 (1938).

Latin America Dispute Resolution Update

Outside of the Second Circuit, the U.S. Court of Appeals for the Sixth Circuit ruled in September 2019 that discovery was available under Section 1782 in aid of a commercial arbitration seated in Dubai.¹⁵ In reaching this conclusion, the court analyzed

¹⁵ *In re Application to Obtain Discovery for Use in Foreign Proceeding*, 939 F.3d 710 (6th Cir. 2019).

the meaning of the word “tribunal” and concluded that it “includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties.”

US Courts May Require Production of Information From Messaging Apps

U.S. courts often grant litigants access to a wide variety of sources of information from opposing parties in order to prosecute or defend against a lawsuit. Generally, employees’ use of text and other messaging apps (such as WhatsApp) are discoverable in U.S. litigation, just like emails, papers and other more traditional types of work documents. Although discovery issues in U.S. litigation revolving around messaging apps are not new, preservation of this data for review in ongoing litigation remains a frequently disputed issue. For example, in June 2019, a magistrate judge in the U.S. District Court for the Southern District of New York imposed sanctions — including costs and attorneys’ fees — on a party that failed to collect text messages from relevant cellular devices.¹⁶ In addition, the court permitted the prevailing party to present evidence to the jury about the unpreserved data in order to allow the jury to make credibility determinations.¹⁷

Under Federal Rule of Civil Procedure 37(e), a party must take reasonable steps to preserve electronically stored information in

¹⁶ *Karsch v. Blink Health, Ltd.*, No. 17-CV-3880 (VM)(BCM), 2019 WL 2708125, at *24, 26 (S.D.N.Y. June 20, 2019).

¹⁷ *Id.* at *27-28.

anticipation or conduct of litigation. U.S. federal courts repeatedly have emphasized parties’ obligations to preserve, or instruct employees to preserve, potentially relevant data from messaging apps. In *Congregational Rabbinical College of Tartikoff, Inc. v. Village of Pomona*,¹⁸ for example, the court found that the defendants had a duty to preserve a Facebook post and related text messages discussing the post because they reasonably should have known that the messages were relevant to the case.¹⁹ Courts have held that this duty applies even to personal devices, where the employee was conducting business on a personal device and it could be presumed that the disclosing party knew or should have known of such conduct.²⁰ As text and other messaging apps and social media are broadly used to discuss business matters, potential litigants in U.S. should be aware of the potential preservation consequences for U.S. litigations.

¹⁸ 138 F. Supp. 3d 352, 386 (S.D.N.Y. 2015).

¹⁹ *Id.* at 388.

²⁰ *In re Pradaxa (Dabigatran Etexilate) Product Liability Litigation*, MDL No. 2385, 2013 WL 6486921, at *19 (S.D. Ill. Dec. 9, 2013) (*overruled on other grounds* 745 F.3d 216).

Latin America Dispute Resolution Update

Contacts



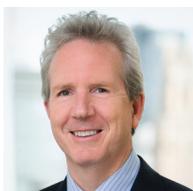
Julie Bédard

Partner / São Paulo / New York
55.11.3708.1849
julie.bedard@skadden.com



Gregory A. Litt

Partner / New York
212.735.2159
greg.litt@skadden.com



John L. Gardiner

Partner / New York
212.735.2442
john.gardiner@skadden.com



Timothy G. Nelson

Partner / New York
212.735.2193
timothy.g.nelson@skadden.com



Lea Haber Kuck

Partner / New York
212.735.2978
lea.kuck@skadden.com



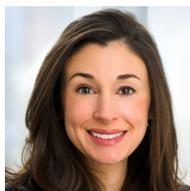
Betsy A. Hellmann

Counsel / New York
212.735.2590
betsy.hellmann@skadden.com



David Herlihy

Partner / London
44.20.7519.7121
david.herlihy@skadden.com



Jennifer Permesly

Counsel / New York
212.735.3723
jennifer.permesly@skadden.com

This communication is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This communication is considered advertising under applicable state laws.

Four Times Square / New York, NY 10036
212.735.3000