



Kobre & Kim's Cross-Border Disputes Team

NOVEMBER 14, 2024



Adriana Riviere-Badell
Miami
adriana.riviere-badell@kobrekim.com



Ana Frischtak
São Paulo
ana.frischtak@kobrekim.com



Andrew Lomas
Cayman Islands
andrew.lomas@kobrekim.com



Daniel J. Saval
New York
daniel.savall@kobrekim.com



Jason J. Kang
Shanghai / Hong Kong
jason.kang@kobrekim.com



John Han
Hong Kong
john.han@kobrekim.com

Cross-Border Tools to Aid Latin American Parties in Disputes with PRC Companies

Economic ties between Latin American and Chinese businesses continue to deepen, and while there are unique risks involved if a dispute arises with the Chinese company, Latin American companies and investors can access cross-border strategies to increase their leverage. Below, our team recommends alternate pathways to drive China-based counterparties to a favorable resolution.

Economic ties between Latin American and Chinese businesses continue to deepen. There are unique risks involved if a dispute arises with the Chinese company.

Even if an organization or investor succeeds in an arbitration or litigation against a Chinese company, the Chinese legal system's intricacies may create barriers to getting the company to pay. Latin American companies and investors should consider cross-border strategies to increase their leverage.

Alternate Pathways to Drive China-Based Counterparties to a Favorable Resolution

Non-Chinese judgments and insolvency proceedings are not easily recognized in Mainland China. Traditionally, Chinese courts only recognize foreign judgments based on a narrow reading of "reciprocity" (namely, if a foreign court had enforced a Chinese judgment) or through bilateral treaties. Where winding up the counterparty is an option, it is uncommon for Chinese courts to recognize foreign insolvency proceedings as China has not adopted the UNCITRAL Model Law on Cross-border Insolvency. Chinese courts have recognized foreign insolvency proceedings in four known cases as of September 2023 (United States, Germany, Singapore and Japan), opening the door for limited international cooperation.

Latin American companies and investors involved in or anticipating a dispute with Chinese companies should consider strategies across multiple jurisdictions – including offshore – that can provide them with options and leverage:

1. **Using Hong Kong Arbitration for Dispute Resolution.** Growing links between Hong Kong and mainland China – including through two legal agreements reached in 2019 and 2020 – open pathways for investors to get speedy interim relief (such as property and evidence preservation) in China. For example, the China International Commercial Court (CICC) announced in 2022 that it is extending its jurisdiction to arbitrations administered by the Hong Kong International Arbitration Centre, allowing creditors to seek interim measures directly with the CICC.
2. **Obtain Recognition of Insolvency Proceedings in China via Hong Kong.** Winding-up orders entered in Hong Kong, where Hong Kong is a debtor's center of main interest, can be recognized in mainland China. A groundbreaking 2021 cross-border protocol for recognizing Hong Kong insolvency proceedings in three cities in China—Shanghai, Xiamen and Shenzhen—has been established. The Hong Kong court and parties have already requested the assistance of mainland courts based on the agreement.
3. **Utilize BVI and Cayman Pressure on the Company.** With many Chinese companies utilizing corporate structures and assets in offshore jurisdictions, including the British Virgin Islands and the Cayman Islands, Latin American companies and investors should leverage offshore judicial tools. For instance, parties can petition to wind up companies incorporated offshore and seek, in some circumstances, the appointment of a provisional liquidator to take control of the company's assets, records, and management. The offshore liquidators can then take steps to enforce legal claims they may have against Chinese subsidiaries or affiliates by suing in China, creating judgment debts that can be used to wind up those affiliates to recover value.
4. **Focus on Decision Makers.** In many jurisdictions, directors and senior management of a company (or third parties such as accountants and auditors) are required to provide information regarding the company's assets and financial affairs to shareholders or parties to a dispute involving the company. An examination order can be highly effective.

Growing economic ties between China and Latin America have created opportunities for cooperation between companies from the two regions. However, as disagreements inevitably arise, Latin American investors and companies may run into roadblocks due to the complexities of the Chinese legal system. For those looking to avoid a lengthy and costly dispute, a coordinated, cross-border strategy that leverages valuable tools available in key jurisdictions – especially through Hong Kong, BVI, and Cayman – can help investors and companies improve their positions and chances of success.

About Kobre & Kim

Kobre & Kim is a global law firm focusing on cross-border disputes and investigations, often involving fraud and misconduct. The firm:

- Helps clients realize value from their claims, developing investigative, enforcement and asset tracing/recovery plans in the pre-dispute stage, to maximize future monetization.
- Often works with other law firms as special counsel in matters beyond their geographic reach to enforce high-value judgments and arbitration awards worldwide with our integrated team of Hong Kong solicitors, offshore lawyers, US lawyers, and UK solicitors and barristers (including King's Counsel).
- Maintains our independence as advocates ready to litigate against virtually any institution by avoiding repeat client relationships, and the conflicts of interest that come with them.