CARLTON FIELDS

What Happens In Ecuador Does Not Stay In Ecuador

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In last week's decision in Chevron v. Donziger, the court enjoined the enforcement of a $9.5 billion Ecuadorian judgment against Chevron Corp. for environmental pollution, alleged to have been caused by its predecessor, Texaco Inc., finding that the judgment was procured by fraud and through a pattern of racketeering on the part of Steven Donziger, a New York-based attorney for the Ecuadorian plaintiffs who spearheaded and controlled the Ecuadorian litigation. The court also imposed a constructive trust to prevent Donziger and the Ecuadorian members of his team from profiting from the fraud and the Racketeer Influenced and Corrupt Organizations Act violations. The 485-page decision, with its 1,842 footnotes, reads as something that, in the court's words, would "come only out of Hollywood." It is, among other things, an object lesson to lawyers practicing international litigation in the perils of assuming that what happens in the foreign country stays in the foreign country. Bribery, coercion of judges, judicial corruption, fraudulent evidence and strategic incitement of criminal proceedings may all be, regrettably, de rigueur in some countries, but Chevron demonstrates that judgments resulting from such conduct will not receive comity treatment in the U.S. — and may also get the lawyers into a heap of trouble. As the court said, "[T]he defendants' 'this-is-the-way-it-is-done-in-Ecuador' excuses ... do not help them." **Factual Findings**
The full panoply of the court's factual findings is too extensive to detail here, however, the key findings are:

- Defendants used a $6 billion estimate of remediation costs which they knew to be "without any scientific data" and "wildly inaccurate" to exert pressure on Chevron that the threat of an enormous judgment against it was real. They also used the cost estimate to incite a U.S. Securities and Exchange Commission investigation of Chevron in order to build pressure before Chevron's shareholder meeting, an investigation they knew to be "bogus."

- Faced with unfavorable results of "judicial inspections" of the areas claimed to affected, Donziger and his team coerced the Ecuadorian judge — the first of several to preside over the case — to cancel the inspections by threatening to file a complaint against him for misconduct. In Donziger's words, "the only way the court will respect us is if they fear us — and ... the only way they will fear us is if they think we have ... control over their careers, their jobs, their reputations — that is to say, their ability to earn a living."

- Having instilled "fear" into the judge, Donziger and other defendants successfully pressured him to appoint an independent global expert to assess remediation costs — an expert whom they had secretly recruited into their "army." Defendants then selected members of the expert's "team," set up a secret bank account to funnel money to him, promised him work for life on the post-judgment remediation process, provided him with an office and bought him life insurance. Defendants hired a Colorado firm to clandestinely write the expert's report, which the expert then submitted to the Ecuadorian court under his own signature. To maximize the deception and to bolster the appearance of the expert's independence, defendants claimed they were dissatisfied with the low damages figure, which prompted the expert to file a supplemental report — also secretly written by the Colorado firm — increasing the damage estimate by $11 billion. Defendants then proceeded to tout the "independent" report in a worldwide public relations pressure campaign designed to bring Chevron to the negotiation table. Donziger's explanation, rejected by the court, was that he had never understood his actions to be "impermissible in Ecuador."

- Defendants waged a successful campaign to cause Ecuadorian prosecutors to indict Texaco's former Ecuadorian lawyers who had negotiated a 1998 agreement between Ecuador and Texaco. Defendants' goal was to void the agreement under which Ecuador acknowledged Texaco's completion of required remediation and released it from liability going forward.

- Over a period of several months, defendants secretly funneled payments to a former judge with whom the new presiding judge — who had no experience in civil cases — had a ghostwriting arrangement. The former and presiding judges were referred to in defendants' emails as "puppeteer and "puppet," respectively. Defendants ultimately bypassed the middleman by bribing the presiding judge directly — promising to pay him $500,000 from the proceeds of recovery from Chevron in exchange for his signing the final judgment. Like the global expert's report, the judgment was clandestinely written by the defendants.

Court's Conclusions

The court concluded the Ecuadorian judgment was procured by fraud. Specifically, the court found the defendants perpetrated fraud on the court through corruption, the coercion of judges and the judicially appointed global expert and also by ghostwriting the judgment and misrepresenting the global expert's report as independently prepared. With respect to RICO, the court found that Donziger engaged in a pattern of racketeering activity that included attempted extortion, wire fraud, money laundering, obstruction of justice, witness tampering and violations of the Travel Act through violation of the Foreign Corrupt Practices Act. The court also concluded that decisions of Ecuadorian courts generally may not be afforded comity and recognition in the U.S. because they are rendered in

a judicial system that does not provide impartial tribunals or procedures compatible with due process. The court based this ruling on an extensive discussion of the "severe constitutional crisis" of the Ecuadorian judiciary, the result of which is that judges "can no longer act impartially and with integrity where the matter or dispute to be decided involves important political, social or economic issues and [are] instead subjected to constant pressure and threats that influence [their] decisions." Ecuador thus joins only a handful of other countries — including Iran (Bank Melli Iran v. Pahlavi), Liberia (Bridgeway Corp. v. Citibank), Paraguay (HSBC USA Inc. v. Prosegur Paraguay SA.) and Nicaragua (Sanchez Osorio v. Dole Food Co.) — whose judiciaries have been found by U.S. courts not to provide impartial tribunals. **Chevron Made Good Tactical Decisions**

Donziger assumed that Chevron would never be able to obtain evidence of what transpired in Ecuador. "We don't have the power of subpoena in Ecuador," he said to the head of Amazon Watch. Donziger, however, had failed to take into account that under 28 U.S.C. § 1782, a party to a foreign proceeding may obtain evidence in the U.S. that is relevant to that proceeding. Beginning in 2009, Chevron began obtaining § 1782 subpoenas in the U.S. Through these Chevron ultimately gathered critical evidence from the Colorado firm who ghostwrote the global expert's report. It also obtained evidence from a filmmaker hired by Donziger to document his campaign against Chevron. The latter resulted in the production of 600 hours of raw footage, including outtakes of Donziger's team's recruitment meeting with the global expert and an ex parte meeting with Ecuadorian judges. Chevron also obtained a § 1782 subpoena against Donziger himself, resulting in the production of a "trove of documents and emails," as well as a deposition of Donziger. The court noted that "much of the evidence in this case was obtained in that proceeding." Donziger's belief that what happens in Ecuador stays in Ecuador did not pan out. Chevron's other key decision was to move preemptively to block enforcement of the judgment. Challenges to foreign judgments usually arise in actions brought by judgment creditors who ask U.S. courts to recognize the foreign judgments and, ultimately, to enforce them. It is normally at that point when the judgment debtor interposes defenses of fraud, lack of impartial tribunals, etc., available under the Uniform Foreign Money-Judgments Recognition Act. Chevron did not follow this route. Rather than waiting for Donziger to bring an action to recognize the judgment in the U.S., Chevron moved preemptively to enjoin enforcement of the judgment — even before it was issued, but when the issuance was imminent — on the grounds that the judgment was obtained by fraud and violations of RICO, and also on the grounds that the Ecuadorian judiciary does not provide impartial tribunals and due process. As the evidence revealed, Donziger's strategy "contemplated an initial multipronged attack on Chevron, its assets and subsidiaries in multiple jurisdiction outside the [U.S.], followed by proceedings here." Donziger, it appears, did not want to begin the enforcement phase in the U.S., even though this is where the bulk of Chevron's assets are situated. His goal was to pick off "easy" enforcement jurisdictions first, perhaps to build a war chest for future enforcement proceedings or to pressure Chevron into a global settlement, or both. Indeed, several such enforcement proceedings had already been commenced. Had Chevron waited for Donziger to bring a recognition action in the U.S., instead of acting preemptively to challenge the judgment, it might have found its assets worldwide seized before it had an opportunity to mount a meaningful challenge. It is highly unlikely that Chevron would

have been able to present the kind of massive evidence it did in a civil code jurisdiction where presentation of evidence, particularly testimonial, is much more limited. To be sure, the federal court did not issue a global injunction; it only enjoined enforcement of the judgment in the U.S. Ecuadorian plaintiffs are thus still free to seek to enforce the judgment anywhere outside the U.S. But now, Chevron is well ahead of the game, armed as it is with a comprehensive decision of a U.S. court detailing a far-ranging fraud through which the judgment was procured. Foreign courts are not bound by the decision, but few would ignore it. It carries substantial weight and gives Chevron a leg up in its worldwide defense against the Ecuadorian judgment. **Some Lessons From Chevron** Sometimes U.S. litigators forget that they are still U.S. lawyers, even when engaged in a foreign litigation. It is all too easy to overlook that the code of ethics applies to you when you are immersed in a legal system where, in Donziger's words, judges "make decisions based on who they fear the most, not based on what the laws should dictate." But, as the court noted, Donziger's "conduct, whether in the [U.S.] or in Ecuador, was subject in every respect to the New York rules governing the conduct of lawyers." Donziger's is an extreme, sad case. Few lawyers would ever contemplate doing what he did. But the risk of ethical slippage when neck-deep in a foreign litigation, where rules and norms are radically different from the U.S. is real and should be guarded against. When your foreign local counsel picks you up at the airport and says, "Let's go see the judge" (ex parte), it may be tempting to rationalize: "When in Rome ..." Don't — your U.S. lawyer's hat is never off. The case also amplifies the perils of using litigation as a mere tool in a campaign of full-throated public advocacy. Donziger viewed his efforts to force Chevron into settlement as a "political-style campaign driven by a legal case." He hired and oversaw public relations professionals and lobbyists, and collaborated with nongovernmental organizations like Amazon Watch, whose public materials and complaints he drafted. Through these, Donziger sought to generate "pressure from shareholders, disinvestment, pressure from governmental investigators, diplomatic pressure, celebrity endorsements and pressure from Congress and NGOs." In court, Donziger claimed that his conduct outside the courthouse was constitutionally protected "petitioning activity" done for the purpose of remedying what he believed to be a wrong. The court ruled that while "advocacy through public statements and lobbying activities for the purposes of inflicting economic harm" is protected, when such public out-of-court advocacy" rests on knowingly false statements," it constitutes extortion or attempted extortion and can serve as a predicate act for a RICO violation. Donziger was found guilty of just this type of advocacy. According to the court, what might have began as zealous representation devolved into a campaign of fraud and extortion. Chevron is a cautionary tale to lawyers: In the words of the court, "Justice is not served by inflicting injustice. The ends do not justify the means. There is no 'Robin Hood' defense to illegal and wrongful conduct." *Originally published by Law360 (subscription required).*

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