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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

U.S. Discovery in Foreign Proceedings: Section 1782 and Chevron in Ecuador

Even where a party prevails on its choice of forum outside the United States, evidence vitally important to the case may remain firmly lodged in this country; 28 U.S.C. §1782 is an invaluable tool in such circumstances, permitting discovery of evidence located in the United States for use before a foreign tribunal. The saga of Chevron Corporation, as recently told by the U.S. District Court for the Southern District of New York in *In re Application of Chevron Corp.*,[1] provides a classic illustration of how to use that tool effectively in cross-border litigation.

The intrigue surrounding the litigation arising from the Ecuadorian oil exploration and drilling activities of Chevron's predecessor, Texaco, is sufficiently interesting to have been the subject of a movie. And it is the outtakes of that movie, which Chevron believes will support its position in three separate litigations pending in Ecuador, that Chevron sought to obtain from the filmmaker under §1782 in *In re Application of Chevron Corp.*

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The Litigation Backdrop

The precursor to those Ecuadorian litigations was a class action filed in 1993 in the Southern District of New York alleging that a subsidiary of Texaco had caused billions of dollars in environmental damage over decades of oil exploration and drilling in Ecuador. Texaco fought and won a nine-year battle to transfer that action from New York to Ecuador, arguing that the majority of the evidence and witnesses were located in Ecuador and that the Ecuadorian courts would be able to "provide a fair and alternative forum for the plaintiffs' claims."[2] Ultimately, the case was dismissed on the grounds of forum non conveniens.[3]

In 1995, while the class action was still pending in New York, the Texaco subsidiary entered into a settlement with the Ecuadorian government, in which the subsidiary agreed to perform environmental remediation in exchange for the release of all environmental claims by Ecuador and its state-owned oil company against Texaco and related companies. In 1998, the Government of Ecuador entered into a final release with Texaco, agreeing that the remediation contemplated in the settlement had been fully performed and broadly releasing the Texaco parties of all liability.

In 2003, following the forum non conveniens dismissal of the New York class action, a group of Ecuadorians commenced the first Ecuadorian litigation—an environmental class action against Chevron, as a successor to Texaco, under an Ecuadorian law passed after the final release was executed. Chevron argued that the new law impermissibly allowed private plaintiffs to pursue government claims that had been released through the settlement and final release. Also in 2003, the Government of Ecuador instituted the second Ecuadorian action—a criminal prosecution of two Chevron attorneys and others for allegedly filing false public documents in connection with the settlement agreement and final release.

> Chevron sought to obtain under §1782 outtakes of a movie to support its position in three litigations pending in Ecuador.

The Ecuadorian Prosecutor General initially declined to prosecute the case, but after the election in 2006 of a new president (who had made statements critical of the oil companies' environmental record and in favor of diverting oil company profits to fund social programs), and the appointment of a new Prosecutor General, the criminal case was resurrected.

The third Ecuadorian action is an international arbitration initiated by Chevron in which Chevron asserts that the Ecuadorian government abused its own justice system in connection with both the Ecuadorian environmental class action and the criminal prosecution.

Petition Seeking Outtakes

Chevron and the two attorneys targeted in the criminal case filed a §1782 petition in the Southern District of New York seeking discovery from a filmmaker who had been solicited by plaintiffs in the Ecuadorian class action to produce a documentary of events relating to that case. The film, titled "Crude," was filmed between 2005 and 2008, and released in 2009.

Petitioners sought discovery of the raw footage from the film, located in the Southern District of New York, including outtakes not included in the final documentary which petitioners argued were likely to be directly relevant to all three Ecuadorian proceedings. Petitioners based that application, in part, on footage included in an earlier version of "Crude" offered on Netflix, but deleted from the final version sold in the United States (at the direction of class action plaintiffs' counsel), which depicted plaintiffs' counsel meeting with a member of the team of court-appointed damages experts who were supposed to be neutral.

Petitioners also highlighted scenes in the film showing one of plaintiffs' lawyers engaging in self-professed "pressure tactics" to persuade a judge to block inspection of a laboratory being used by plaintiffs, and meeting with the President of Ecuador. Petitioners argued that these scenes supported their claim that the raw footage would demonstrate that the court-appointed expert was biased toward plaintiffs and that the Ecuadorian government and judicial system had been improperly influenced by plaintiffs.

Statutory Factors Met

Southern District Judge Lewis A. Kaplan found that petitioners had satisfied the statutory requirements that a §1782 application be made by "any interested person" in a proceeding before a foreign tribunal, and that the person from whom the discovery is sought resides or is found in the district in which the application is made.[4] He observed that Chevron, which was a party to the class action and arbitration, and its two employees, who were facing prosecution in the criminal case, were "interested persons" within the meaning of the statute. He rejected the argument that the arbitral tribunal did not constitute a "foreign or international tribunal" for purposes of §1782, relying on dictum from the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices Inc.* that the term "tribunal" includes "administrative and arbitral tribunals."[5]

Discretionary Factors

Judge Kaplan went on to weigh the factors set forth in *Intel* to guide a court's discretion once the statutory requirements of §1782 are met: (1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent §1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings

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underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the §1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the subpoena contains unduly intrusive or burdensome requests.[6]

He found that the first factor, the jurisdictional reach of the foreign tribunals, favored petitioners, as none of the Ecuadorian tribunals in the three proceedings had jurisdiction to compel the production by the Manhattan filmmaker. He also found that the second factor, the nature and receptivity of the foreign tribunals, favored the petitioners. Respondents had sought a ruling from the Ecuadorian court in which the class action was pending regarding its "receptivity" to Chevron's §1782 applications, but had received no response.

Noting that the petition before him sought evidence for more than just the class action proceeding, Judge Kaplan stated that although the court's views "could be helpful," they were not dispositive. He also observed that U.S. courts had "routinely" granted §1782 applications in connection with matters pending in Ecuadorian courts, including the very class action litigation at issue. Finally, Judge Kaplan recognized that "the petitioners seek relief here in part out of concern that political influence may have been brought to bear in Ecuador in an inappropriate way."[7]

With respect to the third factor, Judge Kaplan found no effort to circumvent Ecuadorian proof-gathering restrictions. He rejected the contention that petitioners should have tried some other means of obtaining the requested discovery before filing the §1782 petition, noting that none of the foreign tribunals had jurisdictional reach over the material. Finally, he found that requiring the filmmaker to produce the raw footage was not intrusive or unduly burdensome because petitioners would bear the cost and time associated with copying, editing and reviewing the material.[8]

Journalists' Privilege

Even where the statutory and discretionary factors are satisfied, §1782 expressly provides that it may not be used to compel production of information protected by "any legally applicable privilege." In this case, the respondents argued that production would violate the journalists' privilege, which protects information gathered by a journalist, as well as the journalists' observations and perceptions.[9]

The journalists' privilege is a qualified privilege which offers stronger protection for confidential information than for non-confidential information, with the burden resting on the journalist to establish confidentiality. The party seeking confidential information must make a strong showing that the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."[10] If the information is deemed non-confidential, the party seeking its production must show only that the material is of likely relevance to a significant issue in the case, and is not reasonably obtainable from another source.[11]

Noting that the subjects of the documentary had signed releases expressly disclaiming any expectation of confidentiality, Judge Kaplan found that the filmmaker possessed an "uncontrolled right" to make public all or any part of the material, and that the "Crude" outtakes were thus non-confidential.

Judge Kaplan went on to find the material sought was highly relevant to each of the three Ecuadorian proceedings. Specifically, he noted that interactions between plaintiffs' counsel and the expert in the class action litigation would be relevant to the supposed independence of the expert and the validity of his damages assessment. He concluded that interactions between counsel and the judiciary or other government officials similarly would be relevant to Chevron's claims for denial of due process and violation of the settlement agreement, and to the individuals' claims that the prosecutions were politically and wrongfully motivated.[12] He rejected the argument that petitioners were on a fishing expedition, finding that the actual footage excerpts (and the fact that plaintiffs' counsel had directed removal of other footage) amply supported the inference that the outtakes contained additional relevant information.

Finally, Judge Kaplan found that the material could not reasonably be obtained from other sources, but was unique and could provide "unimpeachably objective evidence." Accordingly, he held that petitioners had overcome the qualified journalists' privilege.

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Judge Kaplan concluded by noting the irony in Chevron's present argument that it was the victim of political influence and injustice in Ecuador when it had previously extolled the virtues of the Ecuadorian legal system in obtaining the forum non conveniens dismissal. Observing that Chevron's change in position might be understood in light of the intervening change in Ecuador's political climate, Judge Kaplan "expresse[d] no view" as to whether assertions of political influence and corruption were supported by the evidence, concluding only that the evidence contained in the "Crude" outtakes should be brought to light.[13] He granted the petitioners' motion to compel the production of the materials—a decision respondents quickly appealed to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit Appeal

Labeling the district court's order "the greatest seizure of outtakes in American history," the respondents argued on appeal that Judge Kaplan's §1782 order ran "roughshod over the journalist's privilege."[14] They objected to the scope of that order contending that "[e]ven if the few minutes of film cited by the Order established likely relevance for a very discrete portion of footage…, there is no basis at all for the astonishing order of all 600 hours of outtakes, more than 300 times the footage of Crude itself, and thousands of times more footage than the few minutes the Chevron parties cited below." Appellants believed that the district court too easily dismissed the filmmaker's claims regarding the impact that seizure of the non-confidential outtakes would have on individual filmmakers and the wider community of journalists.[15]

It appears that the argument that Judge Kaplan's order intruded too far into the protected zone of the filmmaker's editing process may have gained some traction with the Second Circuit. On July 15, 2010, the court issued a summary order, with an opinion to follow, directing the filmmaker to produce some, but not all of the footage that the district court had ordered be produced. Specifically, the court ordered production of unreleased footage showing (a) plaintiffs' counsel in the class action litigation; (b) private or court-appointed experts related to the class action litigation; or (c) current or former officials of the Ecuadorian government.[16] Although the rationale for the Second Circuit's order remains to be seen, it reinforces the usefulness of §1782. Moreover, the order appears to shift the burden of sifting through the 600 hours of material for that which is most directly relevant to the litigations away from the party seeking production and onto the parties trying to limit it.

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1. __F.Supp.2d__, 2010 WL 1801526 (S.D.N.Y. May 10, 2010).
2. Id. at *2 (internal citations omitted).
3. *Aguinda v. Texaco Inc.*, 142 F. Supp.2d 534 (S.D.N.Y. 2001), aff'd, 303 F.3d 470 (2d Cir. 2002).
4. 28 U.S.C. §1782(a).
5. 542 U.S. 241, 258 (2004).
6. *In re Application of Chevron Corp.*, 2010 WL 1801526, at *5.
7. Id. at *7.
8. Because the Chevron petition was filed shortly after the documentary film's release, the respondents had no argument that petitioners unduly delayed their §1782 application, but such arguments have resonated in other cases, particularly when coupled with broad requests for information that would place substantial burden on the producing party. See *In re Ex Parte Application of Apotex Inc.*, 2009 WL 618243 (S.D.N.Y. March 9, 2009); *Aventis Pharma v. Wyeth*, 2009 WL 3754191 (S.D.N.Y. Nov. 9, 2009).
9. *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999).
10. *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982). See also *Gonzales*, 194 F.3d at 31.
11. *Chevron*, 2010 WL 1801526, at *9 (citing *Gonzales*, 194 F.3d 29).
12. Id. at *10-11.
13. Id. at *12-13.
14. Respondents also argued on appeal that all but the first *Intel* factor weighed heavily against Chevron, asserting that the order was highly intrusive and burdensome, and would compromise the filmmaker's work and ability to gain access to people for future films. They further argued that the order overlooked §1782's interest in promoting comity, stating "[o]ne can only imagine how a federal court would respond if a litigant sought fact discovery in a foreign jurisdiction years after the discovery deadline and soon before pretrial briefs were due." Brief and Special Appendix for Respondent-Appellant Iago Agrio Plaintiffs, *Chevron v. Berlinger*, Nos. 10-1918-cv(L), 10-1966-cv(CON), 2010 WL 2600668, at * 41 (2d Cir. June 14, 2010).
15. Id. at * 46-47. A number of amicus briefs were filed with the Second Circuit. The National Association of Criminal Defense Lawyers submitted a brief in support of the individual Chevron employees, arguing that a criminal defendant's interest should trump any journalists' privilege asserted by appellants. Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Appellees Pallares and Veiga Urging Affirmance, *Chevron v. Berlinger*, Nos. 10-1918-cv(L), 10-1966-cv(CON), 2010 WL 2725768 (2d Cir. July 2, 2010). Several media outlets, filmmakers, and related associations submitted a joint brief urging reversal of Judge Kaplan's order, arguing that Chevron had not met its burden in overcoming the journalists' privilege with respect to the approximately 600 hours of documentary film outtakes. Brief of Amici Curiae of ABC Inc., et al., *Chevron v. Berlinger*, Nos. 10-1918-cv(L), 10-1966-cv(CON), 2010 WL 2648173 (2d Cir. June 23, 2010).
16. *Chevron v. Berlinger*, Nos. 10-1918-cv, 10-1966-cv, Order (July 15, 2010). The appellants' subsequent motion for an order amending the Second Circuit's July 15, 2010, Order or, in the alternative, for a stay of the July 15 Order pending issuance of the opinion was denied. *Chevron v. Berlinger*, Nos. 10-1918-cv, 10-1966-cv, Order (July 22, 2010).