

CLIENT ALERT

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The Chevron Judgment: Protecting Your Business from Foreign Courts

by John L. Turner

An Ecuadorian court has entered a \$8.6 billion dollar judgment against Chevron Corp. for environmental damage allegedly caused between 1964 and 1992 by Texaco, Inc. Chevron acquired Texaco in 2001. The astronomical judgment is actually over twice the amount of Ecuador's dollar reserves. Chevron's balance sheet can absorb the hit—but it likely will not have to pay. U.S. law provides safety valves against foreign country judgments rendered through fraud or that otherwise offend U.S. public policy. Nevertheless, businesses operating in potentially hostile foreign countries should pay close attention to the risks they face.

A judge in Lago Agrio, Ecuador, ordered Chevron Corp. to pay \$8.6 billion in fines and damages. The judgment stems from a nearly 20-year old lawsuit against Texaco, Inc., over alleged chemical and waste-water dumping in the Amazon River basin.

Adding insult to injury, the judge threatened to tack on an additional \$8.6 billion in punitive damages if Chevron does not publish an apology in the country's major newspapers within 15 days. Not surprisingly, Chevron plans to appeal.

Background

Texaco, which Chevron acquired in 2001, had operated in Ecuador from 1964 until 1992. Starting in 1977, Texaco operated the field with Ecuador's state-owned oil company holding a 62.5% stake.ⁱ In 1992, the government nationalized the operation and Texaco withdrew from Ecuador.ⁱⁱ As part of the exit, the Ecuadorian state-run oil

company released Texaco, who had also agreed to clean up the affected areas.

Soon after, the first case was filed in New York in 1993. American courts, however, refused to exercise jurisdiction over the dispute.ⁱⁱⁱ In 2003, the plaintiffs filed the current action after the government passed a stringent environmental law.

Both sides submitted expert reports. Last year, the court-appointed expert opined that Chevron was liable for \$27.3 billion in damages and as much as \$8.4 billion in "unjust enrichment".^{iv} Chevron countered with its own 9,000 page report showing quite the opposite.

The adverse ruling is no surprise to Chevron. The company filed a federal court action late last year to prevent enforcement of any judgment and to gather evidence of the plaintiffs' bad faith conduct of the case.

Even if it were enforceable (and that is doubtful), the decision is not a company killer. According to its SEC filings, Chevron had \$17.1 billion in cash and cash-equivalents as of December 31, 2010. Chevron's market capitalization is \$195 billion, or more than three times Ecuador's economic output.

Putting the Judgment into Perspective

By local standards, the judgment's amount is astronomical. At \$8.6 billion, the judgment is equal to 15% of Ecuador's 2009 gross domestic product.^v If punitive damages are included, the figure climbs to 30%. If paid, the judgment would increase Ecuador's dollar reserves by over 250%.^{vi}

Such figures strongly suggest that the judgment is designed as much for domestic political consumption as it is to ameliorate the damages the Lago Agrio judge found. That, however, is no comfort for businesses facing such potential threats.

Enforcing Foreign Country Judgments

Chevron has no assets in Ecuador. This means the plaintiffs will have to travel internationally to collect.

In the U.S., the Uniform Foreign Money Judgment Recognition Act (the "Act") provides that, subject to certain exceptions, foreign judgments that are "final, conclusive and enforceable" in the country where rendered are deemed conclusive between the parties and enforceable by U.S. courts.^{vii} The Act states that "a foreign country judgment need not be recognized if . . . the *cause of action* on which the judgment is based is repugnant to the public policy of this state."^{viii}

Texas recognizes the Act, calling it the Texas Recognition Act.^{ix} Texas courts have generally enforced foreign money judgments that are "final and conclusive where rendered."^x At the same time, Texas

courts reserve the right to evaluate a foreign country judgment to ensure, for example, that the foreign court had jurisdiction; that the judgment was not obtained by fraud; or whether enforcement would violate public policy.^{xi}

The "public policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."^{xii} Furthermore, "it is well established that mere divergence from American procedure does not render a foreign judgment unenforceable."^{xiii}

In the Chevron case, a New York federal court has already found evidence of fraud. In anticipation of an adverse judgment, Chevron filed an action in New York federal court to gather evidence of fraud, and prevent enforcement of the forthcoming judgment. Chevron's lawyers then subpoenaed a filmmaker to produce unused film footage from *Crude*, a documentary sympathetic to the plaintiffs. Once obtained, the outtakes are reported to have shown the plaintiffs' Ecuadorian counsel describing how the court-appointed expert, Ricardo Cabrera, was paid by the plaintiffs and that the report was "ghost written" by U.S. consultants.

Upon reviewing this evidence, U.S. District Judge Lewis A. Kaplan found there was "substantial evidence" that "Cabrera was appointed as a result of Lago Agrio plaintiffs' *ex parte* contacts with and pressure on the Ecuadorian courts"; that "at least part of his report" was ghost written by plaintiffs retained consultants, but that "the report was passed off as Cabrera's independent work."^{xiv} Judge Kaplan concluded that Chevron's allegations of fraud were supported by credible evidence.

Where Businesses are at Risk

The ruling raises several questions for U.S. businesses operating in foreign countries

with potentially hostile governments. Gathering information on which host governments are hostile to U.S. business interest is, therefore, the first question managers should consider.

The risks to foreign energy firms operating in Ecuador are well-known. Since his election, Ecuadorian president Rafael Correa's government has been hostile to international energy producers.

Transparency International, a non-partisan organization that tracks political corruption, ranked Ecuador 127th out of 178 nations for governmental transparency and accountability. Other major Latin American countries ranked as follows:

Rank	Country	Score
21	Chile	7.2
69	Brazil	3.7
73	Panama	3.6
78	Columbia	3.5
98	Mexico	3.1
105	Argentina	1.4
134	Honduras	2.4

Businesses operating in those countries scoring 3.5 or less face a credible risk that government corruption could adversely affect their operation.

Protecting Your Business

The second question that business owners and managers should ask is what they can do to protect themselves from this sort of corruption.

The first place to check is your company's insurance coverage. Many insurance policies do not cover so-called "political risk" stemming from expropriation, contract repudiation, or license cancellation. If your business is operating in any of those

countries, especially if you run an import/export business, you should contact your insurance carrier to determine your precise scope of coverage.

Beyond insurance, U.S. laws may prevent your business from having to pay a judgment entered by a foreign court. The Act provides clear protections against the sort of abuses handed out this week in Lago Agrio. In Chevron's case, the company has already favorable rulings that may prevent the plaintiff from collecting. Such creative collateral attacks may be suitable when there is evidence of fraud.

The last option is closing foreign operations in countries with heightened political risk. For most businesses, however, abandoning a foreign market is both unattractive and unnecessary. Companies spend countless hours and dollars establishing foreign operations. Moreover, careful analysis of the risks together with prudent contingency planning can mitigate all but the most egregious abuses. Therefore, it is important for U.S. businesses to understand the risks they face, and to plan accordingly.

Seeking Assistance and Evaluation

If your business faces such risks, Gruber Hurst Johansen & Hail LLP would like to assist you in evaluating the overall threat. Our attorneys have developed a proprietary method that evaluates the political risks faced by businesses operating in potentially hostile environments. We first take into account local economic, legal, political and industry-specific factors. We will then evaluate those as it relates to your specific business. (Some businesses, such as energy, face particularly keen risks.) Once the report is completed, we will then work with your business to ensure that you have taken all appropriate legal steps to minimize the threat of disruption.

If you have any questions about the content of this alert, please contact the GHJH lawyer with whom you regularly work, or the author of this alert:

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^{xiii} *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 616 (S.D.N.Y. 1991).
^{xiv} *In re Chevron Corp.*, No. 10-MC-00002 (LAK); 2010 U.S. Dist. LEXIS 117679, at *5-6 (Nov. 10, 2010).

ⁱ See Justice or Extortion? The Hounding of an American Oil Company, *The Economist* (May 21, 2009).

ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v Source: World Bank; Data Updated: December 2010).

^{vi} *Id.*

^{vii} *S.A.R.L. Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 477 (2d Cir. 2007).

^{viii} N.Y. C.P.L.R. § 5304(b)(4) (emphasis added).

^{ix} See Tex. Civ. Prac. & Rem. Code § 36.001, et seq.

^x *Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300, 303 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing Tex. Civ. Prac. & Rem. Code § 36.002(1)).

^{xi} See Tex. Civ. Prac. & Rem. Code § 36.005(a)-(b); *Reading & Bates Const. Co. v. Baker Energy Res.*, 976 S.W.2d 702, 715 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (“We reserve the right of Texas courts to evaluate foreign country judgments.”).

^{xii} *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (N.Y. 2006) (internal quotation marks omitted); see also *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) (“A judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought. The standard is high, and infrequently met.”) (internal quotation marks and citations omitted).