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Plaintiffs Choose to Enforce Ecuadorian Judgment Against Chevron in Canada

Roger Alford (General Editor) (Notre Dame Law School) · Thursday, May 31st, 2012

The shoe has finally dropped. Ever since the Invictus Memo was released to the public we knew that the Ecuadorian Plaintiffs were considering twenty-seven different countries to enforce the $18.2 Ecuadorian judgment against Chevron. With Chevron's far-flung assets, it was plausible that the Plaintiffs would choose to enforce the judgment in countries with close ties to Ecuador and a questionable commitment to the rule of law. The good news is that the Plaintiffs have chosen, at least for now, a highly reputable forum–the Ontario Superior Court in Canada–for adjudicating the recognition and enforcement of the judgment. Here's a key excerpt:

> 11. The Judgment of the [Ecuadorian] Appellate Division is a final Judgment in Ecuador and is exigible against the assets of Chevron in whatever jurisdiction any may be found, including Canada.
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> 12. All the facts, findings and conclusions of law stated in the Judgments and Clarifications in Ecuador are res judicata as between the parties.
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> 13. As a consequence of the Decision of the Supreme Court of Canada in Beals v. Saldanha and subsequent jurisprudence, Chevron is estopped from challenging any fact, finding or determination of law in the Ecuadorian Decisions on the merits. Further, Chevron is restricted from challenging the Ecuadorian Decisions on the basis of fraud unless it can demonstrate that the allegations are new, not the subject or prior adjudication and were not discoverable by the exercise of due diligence.

Significantly, the plaintiffs are trying to attach the assets of Chevron Canada Ltd and Chevron Canada Financial Ltd, two wholly-owned subsidiaries of Chevron. Given that Chevron itself has few assets in Canada, the choice is somewhat curious. We know from the Invictus Memo that the Plaintiffs are seeking a jurisdiction that is "flexible" on veil-piercing, including what they call the "rare" case of "reverse veil-peircing", holding the subsidiary liable for the parent's judgment debt. (see p. 23). I do not know whether Canada would fall into the category of a flexible jurisdiction on reverse veil piercing.

The other key question, of course, is how Canadian law treats fraud as a defense to the enforcement of foreign judgments. As reported here, according to one Canadian scholar, Canadian

courts “tend to take a somewhat narrower view of what might constitute fraud than some courts would.” I would be curious if others in the know agree or disagree.

It would appear that the Plaintiffs are confident enough in the merits of their position to avoid the mistake of filing in a court of dubious distinction, but not sufficiently confident enough to subject themselves to the jurisdiction of U.S. courts and the resulting counterclaims that would inevitably follow. As Chevron put it in a statement today, “If the plaintiffs’ lawyers believed in the integrity of their judgment, they would be seeking enforcement in the United States – where Chevron Corporation resides. In the U.S., however, the plaintiffs’ lawyers would be confronted by the fact that seven federal courts have already made findings under the crime/fraud doctrine about this scheme.”

The Statement of Claim makes no mention of the investment arbitration, nor the injunction against Ecuador to take action to prevent enforcement proceedings anywhere in the world.

A copy of the Statement of Claim is available here.

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