

Kluwer Arbitration Blog

Using Arbitration to Promote Due Process and Challenge Foreign Judgments

Roger Alford (General Editor) (Notre Dame Law School) · Friday, March 12th, 2010

In the long-running battle between Chevron and Ecuador over environmental damage, a federal court in New York has denied Ecuador's motion to stay arbitration of a Ecuador-U.S. BIT claim. In September 2009, Chevron filed a notice of arbitration alleging, among other things, that "Ecuador has breached ... the Ecuador-United States BIT, including its obligation to afford fair and equitable treatment, ... an effective means of enforcing rights, non-arbitrary treatment, [and] non-discriminatory treatment."

In the hearing this week, counsel for plaintiffs in the underlying Ecuadorian litigation described the arbitration as "a collateral attack" on a future Ecuadorian judgment. "There is no demonstration that there's even any prejudice to Chevron at this point," said Jonathan Abady. "There's no judgment that has been rendered." The Court nonetheless denied Ecuador's motion to stay the BIT arbitration and allowed the question of due process violations to go forward to arbitration:

The petition contains ... specific grounds asserted by Chevron why a judgment rendered against it pursuant to the litigation now pending in the Ecuadorian Court would not be one rendered in accordance with due process.... I am returning only the arbitrability of the due process claim, and I am expressing no opinion with respect to any other claim or with respect to any claim for relief. Those matters are for the arbitrators. There are also significant issues that have been raised concerning the timing of proceedings before the arbitrators, specifically, whether the arbitration can commence prior to the rendering of a decision in the suit now pending, and that is one of the ... many issues for the arbitration panel to determine, giving consideration to the interests of the parties in matters of timing, which seems to be a great concern.

My sense is that Chevron is bringing this action not only in an attempt to succeed on the merits of its due process claim, but also to send a signal to the Ecuadorian court that any future action that denies Chevron basic due process will be subject to international scrutiny. The Ecuadorian court now faces the unpleasant prospect of knowing that the Ecuadorian government may be on the hook financially for any improper judgment rendered against Chevron.

I also think it is quite plausible that the BIT arbitration is an opening salvo in future attempts by Chevron to challenge the enforcement of the Ecuadorian judgment in foreign courts. If a BIT

arbitration panel concludes that Chevron has been denied due process, this would significantly bolster arguments that the foreign judgment should not be enforced in the United States under the *Hilton v. Guyot* standard. If the arbitral tribunal concludes that Chevron has been denied due process or fair and equitable treatment in the Ecuador litigation, then it will be difficult to enforce an Ecuadorian judgment in the United States consistent with the *Hilton* test requiring a showing of “a full and fair trial abroad ... under a system of jurisprudence likely to secure an impartial administration of justice ... and [that] there is nothing to show either prejudice in the court ... or fraud in procuring the judgment.”

Roger Alford


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