

INTERNATIONAL LITIGATION – U.S. DISCOVERY APPLICABLE TO NON-PARTIES IN PROCEEDINGS ABROAD AND THE EFFECT ON PRIVILEGE: The Third Circuit upholds discovery orders against U.S. residents for use in foreign litigation and determines that attorney-client privilege had been waived and the crime-fraud exception may apply.

U.S. litigants may seek discovery from U.S. residents for use in a foreign or international proceeding to which those residents are not a party, pursuant to 28 U.S.C. § 1782. This may even include privileged materials under certain circumstances, such as if the privilege has been waived or if the crime fraud exception applies.

In *In Re Chevron Corp.*, No. 10-2815, ___ F.3d ___, 2011 WL 322380 (3d Cir. (N.J.) Feb. 3, 2011),¹ a recent decision which was part of intercontinental litigation held in several different courts and arbitration panels in the U.S. and Ecuador, the Third Circuit allowed Chevron, a defendant in a suit for environmental contamination, to seek discovery – including privileged materials – from a New-Jersey based environmental law firm which was assisting clients in litigation in Ecuador.

The case originated with a 1993 class action suit filed in the Southern District of New York by certain communities in the Amazon River area of Ecuador against Texaco, Inc. The suit alleged that a Texaco subsidiary had caused “massive environmental contamination which lead to the illness and deaths of numerous persons in the Amazon River area. Texaco later partially merged with Chevron and Chevron replaced in it in the suit.

In 2001, Chevron sought and eventually achieved dismissal of the case arguing that the suit should be held in Ecuador, based on forum non-conveniens and principles of international comity. As part of its arguments, Chevron contended that the Ecuadorian judiciary was impartial and free from corruption.²

The Ecuadorian plaintiffs then filed in Lago Agrio, Ecuador. Several years into the litigation the court appointed an expert to assess global damages resulting from the contamination. Richard Stalin Cabrera Vega, an Ecuadorian environmental engineer and geologist, was appointed. Cabrera’s fees were ordered by the court to be paid by the plaintiffs.³ Cabrera and a team of technicians conducted inspections of contamination sites and both parties were notified of the inspections and allowed to participate. Cabrera also requested the parties to submit evidence to him, which the plaintiffs did but Chevron did not. Chevron claimed that such ex parte submission of documents was “absurd.” In addition, one member of Cabrera’s team of 14 technical experts, Juan Cristobal Villao Yopez, was also employed by an environmental firm hired by the plaintiffs – defendant Uhl, Baron, Rana & Associates, Inc. (UBR). Cabrera’s final assessment of global damages caused by the contamination was \$27.3 billion.

¹ Available free online at <http://www.ca3.uscourts.gov/opinarch/102815p.pdf> or at Westlaw.

² That dismissal, which was affirmed by the N.Y. Court of Appeals, was conditioned on Chevron’s waiver of statute of limitations arguments and consent to Ecuadorian jurisdiction.

³ On the grounds that they had initially requested the appointment of an expert.

Chevron did not accept the legitimacy of the assessment and contended that the Ecuadorian government conspired with the plaintiffs to influence the hearing in the Lago Agrio court and that the plaintiffs committed fraud in the litigation.

Hoping to preclude recognition of the Lago Agrio court's judgment, in 2009, Chevron filed a notice of arbitration outside of Ecuador under the United Nations Commission on International Trade Law (UNCITRAL) pursuant to the US-Ecuador Bilateral Investment Treaty, naming only the Republic of Ecuador as the opposing party.⁴

Chevron also brought a series of discovery requests against 30 different parties in the U.S. pursuant to 28 U.S.C. §1782, seeking evidence that the Ecuadorian plaintiffs had indeed committed fraud in the prosecution of the Lago Agrio litigation for use in both the Lago Agrios court and the BIT arbitration.

Located in a chapter of the U.S. code dealing with evidence, 28 U.S.C. § 1782⁵ allows district courts to order discovery as "assistance to foreign and international tribunals and to litigants before such tribunals." Subsection (a) states that a federal district court may order a U.S. resident in its jurisdiction to:

give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

Subsection (b) provides an exception for privileged discovery:

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

As part of its requests, Chevron filed a request in a district court in New Jersey, where UBR was located, requesting documents transmitted between UBR (the environmental consulting firm) and Cabrera (the court-appointed expert), between Villao (the dually employed technician) and Cabrera, and between counsel for the Ecuadorian plaintiffs and Villao. In June 2010, the New Jersey district court granted the request, holding that none of the documents were protected by privilege since privilege was either waived or the crime-fraud exception applied to them.

Both the Ecuadorian Plaintiffs and UBR appealed the discovery orders with the Third Circuit. They primarily contend that (1) Chevron's request was not appropriate under § 1782 because the discovery was not intended "for use *in*" a foreign proceeding, but instead to attack the foreign proceeding itself; (2) that the district court abused its discretion in ordering discovery which would not have been accepted by the foreign courts and was aimed at circumventing the policies and rules of the foreign jurisdiction; and (3) that the attorney-client privilege and the work-product doctrine were not waived nor were pierced by the crime-fraud as the district court had held.

⁴ The Republic of Ecuador and the Ecuadorian plaintiffs filed suits in the Southern District of New York to obtain an order staying the arbitration on the grounds that Chevron cannot now argue that the Ecuadorian courts were unfair. The suit was dismissed and appeal is pending in the Second Circuit. The BIT arbitration panel has not yet decided whether it has jurisdiction.

⁵ Available online at http://www.law.cornell.edu/uscode/28/uscode_sec_28_00001782----000-.html.

A three-judge panel of the Third Circuit rejected most of appellants' arguments, holding that discovery request was appropriate under § 1782, that the privilege had been waived to documents provided to the expert (Cabrera), but also that privilege was not waived as to other documents and the crime-fraud exception did not necessarily apply to them. It ordered that the district court review those documents in camera to determine whether the exception applied or not.

With regards to Appellants' claim that Chevron's requests were not proper under § 1782 because Chevron sought discovery not intended "for use in a proceeding in a foreign or international tribunal" but to use to attack the tribunal itself, the court said that since Chevron aims to show in the proceedings themselves the existence of fraudulent behavior, its discovery requests were indeed for use "in" a foreign proceeding pursuant to Section 1782.

As for the Appellants' second claim that the district court abused its discretion in granting the discovery requests, the Third Circuit looked to "the seminal case exploring the parameters of Section 1782," *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). There the U.S. Supreme Court held that there were almost no limits on ordering discovery pursuant to section 1782. For example, the discovery sought did not have to be permissible in analogous U.S. litigation or permissible in the foreign proceeding. The only statutory limitation was for privilege. *Id.*, 542 U.S. at 263.

However, the Court did list factors which it said a district court should take into account in granting discovery pursuant to Section 1782. The first factor was that Section 1782 was primarily for obtaining discovery from non-parties to the foreign litigation. After all, the foreign court could order discovery from a party to the proceeding on its own, without U.S. federal judicial assistance under Section 1782. Second, the court should "take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of . . . the court . . . abroad to U.S. federal-court judicial assistance." Third, "specifically, a district court could consider whether the §1782(a) request" is merely "an attempt to circumvent foreign proof-gathering restrictions or other policies" of the foreign country or the U.S. *Id.* 542 U.S. at 264-66. Citing its own decision in *Bayer A.G. v. Betachem, Inc.*, 173 F.3d 188 (3d Cir. 1999), the Third Circuit said that the burden of proof in assessing these factors was on the opponents of the discovery.

Because UBR was not within the jurisdiction of Lago Agrio Court, and because it was questionable whether UBR and Cabrera were both within the jurisdiction of the BIT arbitration tribunal, the Third Circuit did not see the first factor as a problem for the discovery request.

As for the second and third factors, dealing with the receptiveness of the foreign court to the discovery request and whether the request was aimed merely at circumventing foreign discovery rules, the Court held that the Lago Agrio court's receptiveness to Chevron's requests was not clear, nor was it clear that even if the Lago Agrio court denied all of Chevron's requests that it would not be receptive to the use of the discovery evidence obtained abroad. Nor was there any concrete evidence as to what the BIT arbitral tribunal would do. Therefore not only could the foreign tribunals

not be said to be unreceptive to the assistance, it could also not be said that Chevron was attempting to circumvent Ecuadorian proof-gathering restrictions.

As for the privilege and work-product doctrine protections, the Court held that those protections had been waived as to the documents disclosed to Cabrera. Those documents were given with the admitted aim of having the information contained therein influence, be included and reflected in the global damages report which was public information. They could not be said to still be confidential.

As for the communications between Villao and Cabrera / the Ecuadorian attorneys, for which privilege was not waived, the Court held that Chevron had not met its burden in invoking the crime-fraud exception.

[B]efore the crime-fraud exception can be invoked successfully, the party contending that it applies “must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.”

In Re Chevron, 2011 WL 322380, at *10 quoting *In Re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d. Cir. 2000). Since appellants admitted that Villao was employed by UBR while serving on Cabrera’s staff, a prima facie showing of fraud, the first element, had been met. However, there was not sufficient evidence that the communications sought were in furtherance of the fraud.

Nevertheless, the Court did not outright overturn the discovery orders of those documents. Instead it held that Chevron had made a showing of “a factual basis adequate to support a good faith belief by a reasonable person . . . that an in camera review of the materials may reveal evidence to establish” the applicability of the crime-fraud exception. On such a lesser showing, a party seeking discovery would be entitled to have a court make such a review. *In Re Chevron*, 2011 WL 322380, at *11, quoting *U.S. v. Zolin*, 491 U.S. 554, 555, 572 (1989). The Third Circuit therefore remanded to the District Court to review in camera documents given from Villao to Cabrera or the attorneys.⁶

Local Practice Note

Zell & Co. is one of Israel’s leading transnational litigation firms and has handled numerous section 1782 cases in Israeli courts. The procedure in Israel is handled under the aegis of the International Judicial Assistance Law, 5799 – 1999, and the regulations promulgated thereunder. Typically, requests for international judicial assistance like those under section 1782 are transmitted to the appropriate Israeli court through the Office of the Directorate of Courts in Jerusalem. Experience teaches that such proceedings can be expedited significantly if handled in person with the Directorate and transmitted by hand to the appropriate local court or tribunal. Typically, in each court a judge is assigned to handle transnational judicial assistance requests. In Hebrew these proceedings are referred to as *hikur din* and are separately docketed. Once filed

⁶ However, because Villao was not within the court’s jurisdiction it could only order UBR to produce any such documents which UBR had in its possession.

the court usually gives the party to whom the request is directed an opportunity to respond and a hearing is held in which the ground rules for the discovery are established. We note that Israeli courts will generally permit the requesting party to carry out discovery procedures in accordance with the federal or state rules of civil procedure even though Israeli law does not recognize the foreign discovery devices. Thus, for example, depositions upon oral examination, which are not permitted under Israeli civil procedure, can be conducted in Israel pursuant to a section 1782 request under the International Judicial Assistance Law.