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Employing U.S. subpoena power in support of foreign litigation: *Chevron Corp. v. Donziger* and 28 U.S.C. § 1782

Section 1782 can be a powerful discovery tool, and litigants would be wise to conduct themselve with the same caution employed in U.S. proceedings

By Andrea E. Neuman, Jason B. Stavers, Rachel A. Brook

Relaxed and confident, a U.S. lawyer held court with his allies in a conference room in Quito, Ecuador. He laid out his plan to form a "private army" to "watch over the court" overseeing a multi-billion-dollar Ecuadorian lawsuit against Chevron Corporation. When one of those present raised concerns about a documentary filmmaker's camera crew recording this conversation — saying, "it's illegal to conspire to break the law" — the lawyer brushed off the concern, relying on his conclusion that they "don't have the power of subpoena in Ecuador." And the video of this conversation remained secret for years, along with even more incriminating footage. But in July 2010, a U.S. federal court ordered production of over 600 hours of the filmmaker's video to Chevron, and, in the words of a U.S. federal judge, it "sent shockwaves through the nation's legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct." The footage, and other document and computer hard drive productions ordered by U.S. courts, would ultimately lead to Chevron's successful racketeering case against U.S. lawyer Steven Donziger and others.

Donziger was correct that Ecuador — like many foreign jurisdictions — does not provide private litigants with subpoena power. So how did Chevron obtain this incriminating footage? Chevron relied on a powerful discovery device, 28 U.S.C. § 1782, which authorizes U.S. courts to order discovery "for use in" foreign proceedings. It puts the power, and the risks, of U.S.-style civil discovery in the hands of litigants abroad.

Chevron's multi-faceted discovery effort — more than 20 proceedings — highlights several important aspects of Section 1782. Chiefly, while the plaintiffs' lawsuit took place in Ecuador, the U.S.-based consultants and lawyers they hired were subject to discovery under Section 1782. Apparently unaware of this, Donziger and his U.S. consultants discussed in frank emails their criminal and fraudulent acts, including their scheme to ghostwrite the report of a court-appointed Special Master in Ecuador — a report they would then tout publicly as an "independent" validation of their allegations.

When U.S. federal courts ordered the production of these consultants' files under Section 1782, Chevron obtained revealing emails in which the consultants discussed and implemented the secret drafting of the Special Master's report. Those files also contained the final version of the Special Master's report, filed in Ecuador without a single word being written by the Ecuadorian court's "expert" under whose name it was submitted. Chevron was able to obtain via another Section 1782 proceeding the footage captured by the

documentary film crew, including many remarkable scenes, such as Donziger's response when his experts told him they did not have evidence to support his position: "This is Ecuador, okay? You can say whatever you want and [at] the end of the day, there's a thousand people around the courthouse, you're going to get what you want. . . . [T]his is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win."

While Section 1782 is limited to discovery from persons "found in" the United States, that is not as limiting a requirement as it might first appear. For example, Donziger and his Ecuadorian allies used what they termed a "secret" account at an Ecuadorian bank "surreptitiously to pay [the Special Master]" and later to make payments to another conspirator as part of a scheme to ghostwrite the judgment itself. Although those transactions, and the accompanying record-keeping, took place in Ecuador, Chevron nonetheless obtained the records through a Section 1782 subpoena on the bank's Miami branch.

Moreover, the widespread circulation of documents via email may put important foreign documents in the hands of U.S. persons, even where they are not the initial custodians. For example, the discovery Chevron initially obtained from the U.S. consultants turned out to be even more valuable than was at first apparent, because when the judgment issued in the Ecuadorian court, "portions of eight documents produced [in Section 1782] discovery — internal work product — appear[ed] *in haec verba* or in substance in the Judgment." This seemingly benign discovery turned out to be a smoking gun — proof that the plaintiffs had ghostwritten the judgment itself, just like they had ghostwritten the Special Master's report.

Chevron brought most of these Section 1782 actions seeking material for use in both the Ecuadorian litigation and in an international arbitration it was pursuing against the Republic of Ecuador pursuant to a bilateral investment treaty. Courts have adopted a broad reading of "a proceeding in a foreign or international tribunal," and have generally held that it can reach some private arbitrations and is not limited to purely adjudicatory proceedings, but can reach administrative, investigative and prosecutorial forums. There is variability on the scope of this requirement among circuits, however. Compare *In re Veiga* from the U.S. District Court for the District of Columbia (Section 1782 applies to private arbitration pursuant to treaty) with *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa* from the 5th Circuit (Section 1782 does not apply to private international arbitrations). Furthermore, the proceeding need not have commenced provided it is "within reasonable contemplation."

Non-U.S. litigation generally features less discovery capability — and less discovery risk — than U.S. litigation. Where there are U.S. connections to the dispute, however, Section 1782 can be a powerful discovery tool, and litigants involved in such foreign proceedings would be wise to conduct themselves with the same caution employed in U.S. proceedings, such as in their communications with expert witnesses. Such parties should be neither resigned to nor reliant upon the limited discovery mechanisms in foreign proceedings.

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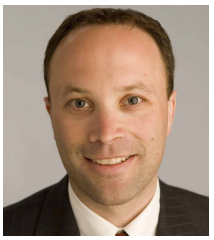

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