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The Recognition of "Ordinary" Mass Toxic Torts

By Paul V. Majkowski – May 21, 2012

The decades-old dispute between Chevron Corp. and Ecuadorian residents alleging Chevron's (then Texaco's) environmental contamination of the Ecuadorian Amazon continues to rear its head, most prominently in the Second Circuit's reversal of the district court's preliminary injunction barring the Ecuadorian plaintiffs from seeking recognition and enforcement of their multibillion-dollar judgment rendered in the Ecuadorian courts anywhere in the world. *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012); *see Chevron Corp. v. Naranjo*, No. 11-1150, 2011 U.S. App. LEXIS 20031 (2d Cir. Sept. 19, 2011) (order vacating preliminary injunction and staying district-court proceedings pending disposition of appeal). The district court had based its ruling on its finding that, among other things, Chevron was likely to succeed on its claims of fraud in the procurement of the judgment, which would preclude its recognition. *See Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 634 (S.D.N.Y. 2011) (observing that the Ecuadorian judicial system "has been plagued by corruption and political interference for decades."), *rev'd*, 667 F.3d 232 (2d Cir. 2012). *See also* P. Majkowski, "Injunction Against Seeking Recognition of an Ecuadorian Judgment," *Mass Torts Litigation* (May 23, 2011).

The Second Circuit rejected Chevron's theory that it was entitled to challenge the recognition of a foreign country's judgment preemptively via a declaratory judgment action. The court concluded that:

> the district court erred in construing the Recognition Act to grant putative judgment-debtors a cause of action to challenge foreign judgments before enforcement of those judgments is sought. Judgment-debtors can challenge a foreign judgment's validity under the Recognition act *only defensively*, in response to an attempted enforcement—an effort that defendant-appellees have not yet undertaken anywhere, and might never undertake in New York.

Chevron, 667 F.3d at 234 (emphasis added).

The court also acknowledged significant concerns for international comity arising from the district court's globally enjoining the Ecuadorian plaintiffs from seeking recognition and enforcement, stating:

> It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations. That inquiry may be necessary, however, when a party seeks to invoke the authority of our courts to enforce a foreign judgment.
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> But when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of

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> the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems.

Id., at 244.

Given the extraordinary breadth and nature of the injunctive relief granted by the district court—characterized by the Second Circuit as "so radical an injunction"—the outcome is perhaps not especially surprising. On the other hand, whether, contrary to the Second Circuit's rationale, there might be some other circumstance where a preemptive challenge to the recognition of a foreign country's judgment is available to a defendant-judgment creditor seems arguable—for example, in the jurisdiction where the defendant is domiciled.

The legal and procedural wrangling over the Ecuadorian judgment will continue, notwithstanding the reversal of the injunction. Among other things, an arbitration panel convened under the U.S.-Ecuador Bilateral Investment Treaty has ordered, as an "interim measure," that the Republic of Ecuador "take all measures necessary to suspend or cause to be suspended the enforcement and recognition [of the Lago Agrio judgment] within and without Ecuador" (Second Interim Award on Interim Measures. *In re Chevron Corp. and Republic of Ecuador*, PCA No. 2009-23 (Permanent Ct. of Arbitration Feb. 16, 2012)). The action in the Southern District of New York will proceed, including Chevron's RICO claims against the Lago Agrio plaintiffs' attorneys and others relating to the purported fraud in underlying action. The plaintiffs' counsel has filed its own lawsuit accusing Chevron of bad faith in pursuing the injunction, stating that it was sought as a means of depleting the plaintiffs' financial resources to pursue enforcement (Complaint, *Patton Boggs, LLP v. Chevron Corp.*, 12-cv-901 (D.N.J. filed Feb. 15, 2012). To the extent that the Lago Agrio plaintiffs launch their "Invictus" strategy of simultaneously seeking recognition and enforcement in multiple jurisdictions, it will be seen how such courts would address certain threshold matters and objections, such as the finality of judgment for purposes of recognition and the effect of the prior pending proceedings.

The Recognition of an Ordinary Mass Toxic Tort

But, setting aside the unique twists and turns of the Ecuadorian controversy, the rendering of a judgment in a mass-toxic-tort action brought in a foreign jurisdiction and its subsequent recognition in the United States is simply not a very well-developed area of law. The incidence of such matters might foreseeably increase in the coming years, however, with the evolution and sophistication of plaintiff's bars and the court systems in foreign jurisdictions, growing international regulation of toxic exposures, the limited availability of a remedy in U.S. courts for mass toxic exposure in a foreign jurisdiction, and a potentially growing preference to litigate outside the strictures of the U.S. system. Thus, how the "ordinary" mass-tort or toxic-tort case will be addressed in the judgment-recognition context could take on greater importance for both plaintiffs and defendants.

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Notably, the U.S. Supreme Court has recently directed supplemental briefing and argument on the issue of the extraterritorial reach of the Alien Tort Statute (ATS) in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Order dated Mar. 5, 2012). While ATS claims based on toxic tort generally have not gained much traction (*see, e.g.*, *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 382-84 (E.D. La. 1997) (rejecting the plaintiff's allegations that "environmental destruction" from mining constituted a violation of international law norms because there is no "universal consensus in the international community"); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (dismissing environmental ATS claims as not stating "clear allegation of a violation of the law of nations")), such a limitation on extraterritoriality could sound their death knell.

It should be observed that the recognition and enforcement of foreign countries' judgments is currently governed by state law in one of three forms: a version of the Uniform Foreign Money-Judgments Recognition Act, which was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1962; a version of the NCCUSL's 2005 revision of the 1962 Act, the Uniform Foreign-Country Money Judgments Recognition Act; or common law in jurisdictions that have not adopted one of the statutes. For ease of reference, the provisions of the model acts are cited, although there are some deviations in particular states' respective adoptions of the 1962 Act or the Revised Act. At present, the Revised Act has been adopted by California, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington, with legislation for its adoption having been introduced for its adoption in Alabama, Massachusetts, Mississippi, and Wisconsin. The 1962 Act remains the law in Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts (the Revised Act was introduced in legislature), Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, the U.S. Virgin Islands, and Virginia. The standards for recognition are variable, depending on where the judgment-creditor proceeds.

In contrast to this variability of state laws, the American Law Institute (ALI) has drafted a proposed federal statute to govern the recognition of foreign countries' judgments. American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2005). A congressional subcommittee hearing on the topic was held in late 2011, though legislation has yet to be introduced. At that hearing, NYU Law Professor Linda Silberman, an ALI co-reporter on the ALI Recognition and Enforcement Project, urged that federal legislation be adopted to serve "the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation," while National Conference of Commissioners on Uniform State Laws Member Kathleen Patchel countered that "when all factors are considered—the effectiveness and uniformity of the existing state law regime, the federalism issues raised by preemption of that regime, the lack of a distinctive federal interest justifying preemption, and the additional costs to the federal judiciary and enforcement officials from federalization in this area—the case for federalizing the area of recognition and enforcement of foreign country judgments has not been

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made." Hearing on Recognition and Enforcement of Foreign Judgments before Subcommittee on Courts, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary, November 15, 2011.

In the recognition context, the facets of a foreign toxic-tort judgment that would tend to be most typically implicated are challenges to due process afforded the defendant in the foreign proceeding and whether the foreign court's exercise of personal jurisdiction over the defendant was proper.

Due-Process Challenge

Due-process concerns or infirmities might be seen in the mass-toxic-tort context based on, for example, the foreign court's treatment of scientific and medical evidence on causation, or the court's procedures, or lack of procedure, for addressing multiple-plaintiff, consolidated cases. The outcome on such issues could turn on the venue in which the plaintiff seeks recognition, because while the 1962 Act requires a showing that "the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" to defeat recognition, the Revised Act, in addition to the foregoing ground, also permits a broader challenge based on a lack of due process in "the specific proceeding in the foreign court leading to the judgment." *Compare* 1962 Act, § 4(a)(1) *with* Revised Act, § 4(c)(8). As reflected in the NCCUSL comments to the Revised Act, the lynchpin of a due-process challenge remains the deprivation of "fundamental fairness." *See* Revised Act, § 4(c)(8), cmt. 12. So, while *Daubert* safeguards and advanced mass-tort litigation procedures might be lacking in foreign proceedings, their mere absence would not seem likely to satisfy a due-process challenge. As one court has observed, "The term 'due process' in this context does not refer to the 'latest twist and turn of our courts' regarding procedural due process norms, because it is not 'intended to reflect the idiosyncratic jurisprudence of a particular state' . . . Rather, it is meant to embody an 'international concept of due process,' defined as 'a concept of fair procedures simple and basic enough to describe the judicial processes of civilized nations, our peers.'" *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1327 (S.D. Fla. 2009) (quoting *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000)), *aff'd*, 635 F.3d 1277 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1045 (2012).

Case law regarding due-process challenges to the recognition of a toxic-tort judgment is sparse. In the *Osorio* case quoted above, the Florida federal district court considered the "international concept of due process" with respect to a Nicaraguan judgment arising from suits alleging injuries, specifically sterility, resulting from purported exposure to the fumigant DBCP. The Nicaraguan court had applied Nicaraguan Special Law 364, which imposed an "irrefutable presumption of causation" to the claims. The district court framed the due-process issue as requiring an examination of "the scientific basis for the irrefutable presumption of causation afforded to plaintiffs who establish DBCP exposure and sperm damage and . . . whether the presumption constitutes a procedure consistent with due process in light of the medical testimony in [the] case." *Id.* The court specifically rejected the plaintiffs' argument that the Nicaraguan

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court's conclusions regarding medical causation could not be reviewed on recognition, reasoning that the due-process consideration "necessarily requires the [recognition court] to examine the procedures, including any applicable legal presumptions, which were in place or were applied by the rendering court." *Id.* at 1327–28.

The court held that the presumption violated due process and refused to recognize the judgment, finding that the Special Law 364's "presumption of causation resulted in findings that are incompatible with medical and scientific facts in several ways." *Id.* at 1328. The court observed that the presumption failed to bear "some reasonable relationship to known scientific and medical facts . . . simply legislate[d] into existence a set of facts based on little more than speculation . . . [and flew] in the face of the unrefuted medical and scientific evidence." *Id.* at 1332–33. The court also found the presumption to be deficient because it failed to account for the alternative causes of the condition complained of, and did not provide for the requisite "individualized examination" of the plaintiffs. *Id.* at 1333.

This reasoning tends to beg the question as to whether and how a foreign court's treatment of expert and scientific evidence in a mass toxic tort matter should be considered in a due process challenge to recognition (particularly, in a recognition action governed by the Revised Act where the due process challenge is based on the "specific proceeding" in the foreign court). Simply, should an *Osorio*-type analysis apply not only when there is a presumption at issue, but also be undertaken for the foreign court's procedures for admitting scientific and medical evidence, to ensure that due process is afforded on the difficult but determinative issue of causation in toxic tort matters? Put another way, are *Daubert* safeguards and mass tort litigation techniques as have been developed in the United States merely the "latest twist and turn of our courts" and a matter of "idiosyncratic jurisprudence," or necessary devices to ensure fairness in a mass-toxic-tort case?

Personal-Jurisdiction Challenge
As with any lawsuit, the existence of personal jurisdiction over the defendant is a threshold matter, and, likewise, lack of personal jurisdiction constitutes a ground for denying recognition of a foreign country judgment, although, as discussed below, the interplay of the personal jurisdiction inquiry with other facets of the recognition scheme creates some nuances that require consideration.

Generally, absent the rejection of a personal-jurisdiction challenge for one of the specific circumstances set forth in the 1962 Act and the Revised Act (for example, if the defendant was personally served within the foreign country), *see* 1962 Act, § 5; Revised Act, § 5, the personal-jurisdiction challenge to recognition "turns on whether exercise of jurisdiction by the foreign court comports with the [recognition jurisdiction's] concept of personal jurisdiction, and, if so, whether that foreign jurisdiction shares [the recognition jurisdiction's] notions of procedure and due process of law," *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83, 850 N.E.2d 647, 651, 817 N.Y.S.2d 600, 604 (2006). In the recognition context arising out of a foreign mass-tort or toxic-tort action involving a domestic manufacturer's product, the inquiry would typically

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involve two steps: whether the foreign jurisdiction's basis for jurisdiction is akin to the recognition state's long-arm statute, and whether the exercise of jurisdiction is consistent with due process, in other words, minimum contacts.

The lack of clarity on the standard governing the second issue, as observed by some commentators following the U.S. Supreme Court's *Nicastro* decision from last term, provides additional concerns in the foreign suit/recognition context beyond those encountered in a comparative domestic challenge to personal jurisdiction. *See, e.g.*, Patrick J. Borchers, "J. Mcintyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test," 44 *Creighton L. Rev.* 1245 (2011); Michael O. Loatman and Martina S. Barash, "'Stream of Commerce' Personal Jurisdiction Only Partially Clarified by Supreme Court," 79 *USLW* 2767 (June 26, 2011). The starting point of such concern lies in Section 5 of the 1962 and Revised Act, which provides that recognition cannot be challenged based on a lack of personal jurisdiction where "the defendant voluntarily appeared in the proceeding, other than for purpose of protecting property seized or threatened with seizure or of contesting the jurisdiction of the court over the defendant." Some foreign jurisdictions, unlike U.S. jurisdictions, do not have a device for making a special appearance to contest personal jurisdiction, so the defendant would need to take a default to preserve a personal-jurisdiction challenge, with a potential consequence being the waiver of other challenges, such as due process.

Taking a default judgment is typically a risky proposition, even where the underlying rationale for such a strategy seems solid. In the recognition context, the risks are no less and might even be somewhat heightened. First, following on the discussion above, in a particular toxic-tort or mass-tort case, it might be that a due-process challenge will be stronger than a personal-jurisdiction challenge, yet that challenge would be foregone as a result of the default. Second, in considering a default, there should not be a false sense of security that a foreign country's default judgment will be more difficult to enforce than a default judgment rendered in a sister state. Certain courts have elevated foreign countries' judgments (which require the separate step of recognition before enforcement) to sister-state judgments (which do not) by virtue of the supposed interplay of the 1962 Act/Revised Act and the Uniform Enforcement of Foreign Judgments Act, and the operation of the national-treatment provision typically contained in a U.S. Friendship Commerce and Navigation treaty entered into with another nation. *See, e.g.*, *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (finding that English judgment was subject to registration under the Uniform Enforcement of Judgments Act); *Vagenas v. Continental Gin Co.*, 988 F.2d 104 (11th Cir.), *cert. denied*, 114 S.Ct. 389 (1993) (finding Greek judgment elevated to status of sister-state judgment for purposes of recognition).

These precedents are arguably flawed in certain respects but nevertheless exist and cannot be discounted in strategizing for a foreign mass-tort or toxic-tort action and its recognition facets. On the former point, the recognition and enforcement of foreign countries' judgments is a two-step process. *See* Revised Act, § 2 cmt. 1 ("By defining 'foreign country' in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive—if a foreign money judgment is subject to full

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faith and credit standards, then the Enforcement Act's registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.").

With respect to the elevation of foreign countries' judgments via the Friendship Commerce and Navigation Treaty, that conclusion does not seem to be consistent with the text. The "national treatment" language ordinarily contained in a Friendship Commerce and Navigation treaty provides as follows:

> Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.
>
> The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or others objects, as the case may be, of such Party.
>
> The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or others objects, as the case may be, of any third country.

This language does not explicitly govern the recognition of judgments, but rather provides for nondiscrimination as between foreign nationals and state citizens in seeking to do a like act—for example, enforcing a foreign-country judgment, or for that matter, enforcing a state judgment. For example, a foreign national holding a state judgment would not have enforcement governed by the 1962 Act or the Revised Act simply because he or she was a foreign national. Conversely, a state citizen holding a foreign judgment would not evade the requirements of the UFMJRA merely because he or she was a state citizen. So, it would be correct to state that the treaty "obligates the states to afford a [foreign] national the same treatment that any United States citizen would receive in an action to enforce a [foreign country] judgment."

In sum, even without the extreme circumstances of the Chevron-Ecuador dispute, the recognition of a judgment from a seemingly ordinary mass-tort or toxic-tort action in a foreign court raises some nuanced issues in an area of law that has not yet been exhaustively developed, and the litigation strategy for a foreign mass-tort or toxic-tort matter should account for the recognition scenarios at the back end of the case.

Keywords: litigation, mass torts, toxic torts, Ecuador, Chevron, personal jurisdiction, due process

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