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Forum Non Conveniens: Another Arrow for Foreign Corporations Haled into U.S. Courts – the Cadbury case.

Though often overlooked, the doctrine of *forum non conveniens* can be a useful device at the outset of a case to avoid burdensome and costly U.S. litigation for foreign corporations that may otherwise be subject to personal jurisdiction, as demonstrated in the recent shareholder litigation involving the Cadbury takeover.

The Doctrine of *Forum Non Conveniens*

The first line of defense for foreign corporations sued in the United States is usually a motion to dismiss for lack of personal jurisdiction. But given the virtually borderless modern economy, together with the “long arm” of U.S. personal jurisdiction, most corporations doing a non-trivial level of business with the U.S. risk being subjected to costly and burdensome litigation and discovery in U.S. courts. Where a foreign corporation is unable to escape personal jurisdiction, however, it should consider the common law doctrine of *forum non conveniens*, which allows a court to defer its jurisdiction where principles of justice and convenience favor the action being brought in another forum. If granted, a motion to dismiss based on this doctrine usually ends the U.S. litigation before significant expenses are incurred.

The doctrine involves a multi-step inquiry. First, a court must determine whether an adequate alternative forum is available for the plaintiff. The availability of the same or similar remedies in the other forum, and the plaintiff’s likelihood of success, is not important – the court need only determine whether the proposed forum has the

capacity to provide a plaintiff with a satisfactory remedy. Only in rare circumstances will another forum be deemed “unavailable,” as in the case where a plaintiff would be denied access to essential evidence or where the foreign jurisdiction provides no remedy whatsoever.

If an adequate alternative forum exists, a court must next determine the appropriate degree of deference to afford the plaintiff’s choice of forum. A court will afford more deference if the plaintiff—and the conflict—have a greater connection to the chosen forum. Forum shopping is a concern of courts, and if it appears that a plaintiff’s choice is motivated by a more favorable body of law, a court may afford it less deference. On the other hand, if either the plaintiff or defendant resides in the chosen forum, a court may afford more deference to the decision to sue there.

Finally, a court will balance various public and private interest factors to determine whether the burden the original forum places on the defendant outweighs the convenience of that forum to the plaintiff. This is a fact-intensive analysis where the court will consider such factors as the application of foreign law, the location of evidence and

witnesses, the potential expenses for the parties, and the interests of having local disputes settled locally.

If, at the end of its inquiry, a court decides to defer its jurisdiction in favor of the other forum, it will usually dismiss the case in its entirety.

Cadbury Plc Shareholder Litigation

The U.S. District Court for the District of New Jersey recently applied the doctrine of *forum non conveniens* to dismiss a purported derivative class action involving Cadbury Plc at the very outset of the case. In *In re Cadbury Shareholder Litigation*, No. 09-cv-5006 (D.N.J.), plaintiffs challenged the actions of the Board of Directors of Cadbury in connection with a hostile takeover bid by Kraft Foods, Inc. The action was brought in New Jersey federal court, even though Cadbury is a U.K. company, U.K. law governed the Board's conduct and the bidding process, and none of the parties resided in New Jersey.¹

Rather than challenging the court's personal jurisdiction over Cadbury and its directors, the defendants argued that the court should dismiss the case on *forum non conveniens* grounds in favor of the U.K. The District Court agreed with the defendants and dismissed the case in its entirety with prejudice. In going through the multi-step analysis described above, the court determined that the U.K. was an adequate alternative forum, that the plaintiff's choice of New Jersey should be granted little deference, and that the public and private interest factors weighed in favor of the U.K. Apart from the obvious link to the U.K., the court found it significant that neither defendants nor

plaintiffs had any connection with New Jersey, and that none of the evidence or witnesses were in New Jersey. The court also recognized that the differences between U.K. and U.S. takeover law did not detract from the availability of an adequate alternative forum and the possibility to redress plaintiffs' grievances in the United Kingdom.

Differences Between Takeover Regimes

The court's decision in the Cadbury matter illuminated a few notable differences between U.S. and U.K. takeover law that are worthy of mention. In England, an administrative body, the Panel on Takeovers and Mergers ("Takeover Panel"), regulates the conduct of bidders and targets in takeover bids. Everything from the timing of announcements, the substance of disclosures, the limitations on board actions and various other processes are regulated by the Takeover Panel, which is designed to provide shareholders with an opportunity to consider and decide on the merits of a takeover bid. By contrast, in the U.S., a takeover or merger is largely an autonomous process, and shareholder disputes are heard only if a conflict is formally presented to a court.

Another significant difference between the two regimes is that defensive measures to a hostile takeover bid (like the poison pill) are generally not permitted under U.K. law during the pendency of a takeover offer. The object of the English system is to allow the shareholder (not the board) to make the ultimate decision with respect to a takeover offer.

Despite these significant differences—or more accurately, because of them—the court in the Cadbury litigation found that the U.K. provided a better forum to hear plaintiffs' dispute.

¹ Cadbury and the Board members were represented by Shearman & Sterling LLP.

Conclusion

The ruling in *In re Cadbury Shareholder Litigation* illustrates the utility of the doctrine of *forum non conveniens* for foreign corporations doing business in the United States. The doctrine deserves due consideration where U.S. litigation involves a foreign dispute and there exists an

alternative forum that could provide potential relief for the plaintiff. Even where there is a significant connection to the United States, if the facts are right, the doctrine of *forum non conveniens* may provide a successful defense at the outset of U.S. litigation.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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