



Forum Non Conveniens Defeats Shareholder Litigation on Cross-Border Mergers

Posted by Scott Hirst, co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Sunday July 25, 2010

Editor's Note: This post comes to us from [Todd Cosenza](#) of Willkie Farr & Gallagher LLP, and is based on a Willkie Farr & Gallagher client memorandum by Mr. Cosenza and [Tariq Mundiya](#).

Two recent U.S. federal district court decisions (*In re Cadbury Shareholder Litig.* and *In re Alcon Shareholder Litig.*) highlight how the common law doctrine of forum non conveniens can thwart class actions commenced by U.S. shareholders challenging cross-border merger transactions. Both decisions also reflect the trend of U.S. courts to refrain from adjudicating claims brought by U.S. shareholders impacting foreign sovereign interests and arising predominately under foreign laws. As the *Alcon* court noted, U.S. courts are increasingly attempting to “avert the unnecessary globalization of this Court’s jurisdiction that would occur if the mere trading of stock on the NYSE would expose foreign businesses to corporate governance challenges in this Court.”¹

Background on Forum Non Conveniens

U.S. courts have the discretionary power to dismiss or stay a case where principles of justice and convenience counsel in favor of the litigation being heard in a foreign court or tribunal, even if the court has personal jurisdiction over a defendant. Forum non conveniens is a common law doctrine that “finds its roots in the inherent power of the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”² In determining whether to apply the doctrine, U.S. courts typically undertake a three-step analysis: (1) whether an adequate alternative forum is available; (2) how much deference should be given to the plaintiff’s choice of forum; and (3) the balance of private and public interest factors implicated in the choice of forum. The third step is typically fact-intensive. Relevant factors in the determination include the potential application of foreign law, the location of evidence and witnesses, the expenses that parties will

¹ *In re Alcon Shareholder Litig.*, 2010 WL 2076991, at *12 (S.D.N.Y. May 24, 2010). The court denied plaintiffs’ motion for leave to file an amended complaint on July 2, 2010. In so doing, the court found that “even if Plaintiffs were granted leave to file their proposed amended complaint, the court’s forum non conveniens analysis would not change, and leave to amend would thus be futile.”

² *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 513 (S.D.N.Y. 2006) (internal quotation marks omitted).

incur by litigating in a particular forum, and the desire to have disputes settled locally. If, after conducting its three-part analysis, the court decides that the action is better suited to proceed in another forum, the case will be dismissed or stayed in favor of a foreign forum.

In re Cadbury Shareholder Litigation

U.S. shareholders of Cadbury PLC, an English company, brought a class action lawsuit in federal district court in New Jersey against Cadbury and its board in connection with the unsolicited bid of Kraft Foods, Inc., a U.S. company, for control of Cadbury. Plaintiffs alleged that members of Cadbury's board had breached various fiduciary duties by failing to engage in good faith negotiations with Kraft after receiving a proposed acquisition offer. Even though English law governed the conduct of Cadbury's board as well as the bidding process, the purported class

action was brought in New Jersey federal district court. Defendants moved to dismiss the complaint on forum non conveniens grounds arguing, among other things, that the United Kingdom had a paramount interest in regulating companies organized under its laws (such as Cadbury) and in resolving such takeover disputes under its processes and procedures.

Following the three-step analysis outlined above, the court first set out to determine whether the United Kingdom was an adequate alternative forum for this dispute. In the United Kingdom, the Panel on Takeovers and Mergers (the "U.K. Takeover Panel"), an administrative (*i.e.*, non-judicial) body, regulates the conduct of bidders and targets in takeover bids. Plaintiffs argued that this administrative body was an inadequate alternative forum to hear their dispute. Swiftly rejecting that argument, the court agreed "with the majority of other courts that have addressed this question" and found that "an administrative forum is not per se inadequate."³ The court found that the U.K. Takeover Panel had "features" — including the ability to enjoin persons from violating its rules, to compel the production of documents, and to order testimony regarding the alleged violation of its rules — that strongly indicated that the U.K. Takeover Panel was an adequate forum to resolve the types of claims being asserted by Cadbury's shareholders.

The court afforded plaintiffs' choice of New Jersey as the proper forum little deference. Although named plaintiffs were U.S. citizens, none of the parties resided in New Jersey, and seven of the nine defendants were U.K. citizens. As to the balancing of public and private interest factors, the court concluded that principles of comity and deference apply with special force in the change-of-control context, as "the direct interest of regulating the takeover of a [foreign] company — and the conduct of the company's directors — is undoubtedly of enormous importance to [the country of incorporation]." The court found that "the focus of Plaintiffs' complaint is the conduct of [foreign

³ *In re Cadbury Shareholder Litig.*, 2010 WL 336276, at *5 (D.N.J. Jan. 22, 2010).

directors], which is necessarily governed by [foreign] laws.” Under these circumstances, any application of U.S. law would be of only secondary importance. The court thus granted defendants’ motion to dismiss on forum non conveniens grounds in favor of the United Kingdom.

In re Alcon Shareholder Litigation

In 2008, Novartis AG, a Swiss corporation, acquired a 25% stake in Alcon Inc., a Swiss corporation whose publicly available shares trade exclusively on the New York Stock Exchange, from Nestlé S.A., along with an option to buy Nestlé’s remaining 52% ownership in Alcon. On January 4, 2010, Novartis publicly announced that it planned to acquire all the outstanding stock of Alcon. Pursuant to the proposed transaction, Novartis exercised the option that it had obtained in 2008 and agreed to pay Nestlé \$180 per share for its remaining 52% stake in Alcon. Novartis also proposed acquiring the remaining 23% of Alcon’s shares (which are publicly traded on the NYSE) through the merger of Alcon into Novartis under the Swiss Merger Act. Each outstanding publicly traded Alcon share would be exchanged for 2.8 Novartis AG shares. At the time of the January 4 announcement, each Alcon publicly traded share was valued at approximately \$150 under this proposed exchange ratio — a discount from the price Novartis proposed to pay Nestlé for its shares of Alcon.

Various U.S. investors who owned shares of Alcon — including municipal and union pension funds — brought a putative class action in the federal district court in New York challenging the proposed Alcon-Novartis merger, and, in particular, the disparity between the \$180 per share to be paid to Nestlé and the \$150 per share that minority shareholders would receive under the proposed transaction. Plaintiffs principally raised three legal claims against Novartis, Alcon, and eight directors and officers of Alcon. First, plaintiffs alleged that by proposing and forcing through the merger, defendants violated fiduciary duties owed to Alcon’s public stockholders. Second, plaintiffs claimed that the proposed merger violated Alcon’s “Organizational Regulations,” which, under plaintiffs’ interpretation, required Alcon’s independent directors to approve the proposed merger. (Alcon’s independent directors had not yet provided such approval.) Third, plaintiffs asserted a claim for promissory estoppel on the ground that certain Alcon U.S. public filings contained “promises” on which minority shareholders relied regarding protections from a “squeeze-out” merger. Novartis moved to dismiss the complaint on grounds of forum non conveniens, arguing that the case belonged in Switzerland because Swiss law defined all of plaintiffs’ rights as shareholders of Alcon and governed the investors’ claims relating to the proposed merger.

After conducting its forum non conveniens analysis, the district court accepted Novartis’ position that the action should be adjudicated in Switzerland. The court found that Switzerland was an

adequate alternative forum because Swiss courts would permit litigation of the “essential subject matter of [p]laintiffs’ claims” under the Swiss Merger Act. The court next rejected plaintiffs’ argument that their forum choice was entitled to considerable deference since they were “U.S. citizens who purchased shares on the NYSE.” Instead, the court concluded that the claims arose out of “voluntary investments in a foreign corporation whose corporate affairs are governed by Swiss law.” Although Alcon’s shares traded on the New York Stock Exchange, the court viewed the U.S. plaintiffs as challenging a “Swiss transaction governed by Swiss law.” As to the third factor (the balancing of public and private interests), the court found that these interests strongly supported dismissal. The court commented that Novartis, Alcon, many of the relevant witnesses, and the related documentary evidence were in Switzerland. Moreover, the “core events, operative facts, applicable law, and associated public policy interests at issue [were] predominately local to Switzerland.” The court noted that “[v]alidating Plaintiffs’ efforts to prevent the consummation of this decidedly Swiss transaction through litigation in a United States court under United States law would undoubtedly provoke similar attempts to enjoin foreign commercial transactions whenever a foreign country’s corporate law is less favorable to a plaintiff’s interests. Principles of international comity and the internal affairs doctrine developed in the choice of law context, though not directly applicable here, are both instructive as to the perils such an approach would entail.” Thus, the court dismissed the entire action provided defendants consented to jurisdiction in any litigation in Switzerland.