Cassels

Here, There, or Anywhere: Supreme Court Consideration of Contractual Forum Clause May Impact Enforceability of Corporate Exclusive Forum By-Laws

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The recent decision of the Supreme Court of Canada refusing to enforce a choice of forum clause in a consumer class action may have implications for shareholder actions or M&A litigation involving dual listed public companies which use US-style exclusive forum by-laws. These by-laws are relatively new to Canada and remain untested.

Exclusive forum by-laws are designed to ensure that shareholder claims relating to governance, internal controls and procedures, allegations of oppression, and breach of duty of care are limited to a single jurisdiction, as chosen by the company. Whether such by-laws will effectively avoid duplicative shareholder actions in multiple jurisdictions remains unknown and the Supreme Court's decision in *Douez v. Facebook, Inc.*[1] makes the enforcement of such by-laws likely less predictable.

Douez v. Facebook, Inc.

In *Douez*, the plaintiff sought to certify a class proceeding, alleging that Facebook had breached provisions of the British Columbia *Privacy Act*.[2] In particular, the plaintiff alleged that Facebook had used her likeness in "Sponsored Stories" for advertising purposes without her consent. The *Privacy Act* provides a private right of action in British Columbia, however all Facebook users, including the plaintiff, were required to agree to terms of use which stipulated that any disputes must be resolved in California according to California law. Facebook sought to enforce that clause.

In a 4-3 split decision, the Supreme Court ruled that the forum selection clause was unenforceable and, accordingly, declined to stay the action in British Columbia. While all of the justices agreed on the test to determine the enforceability of the forum selection clause,[3] there was disagreement as to its application. While all but one member of the Court agreed that the forum selection clause was *prima facie* valid, clear, and applicable to the dispute in question, the majority nevertheless held that there were strong public policy factors, including the implications of unequal bargaining present in a consumer contract of adhesion, which militated against enforcement of the forum selection clause.[4]

Implications for Exclusive Forum By-Laws

In coming to this result, the majority noted that while forum selection clauses are desirable and often enforceable in commercial relationships, consumer relationships are very different and may provide strong reasons not to enforce such clauses (for example, the unequal bargaining power of the parties and the lack of ability to negotiate with the corporation, even as they agree to relinquish significant rights). In overriding the forum selection clause, the Supreme Court appears to have weighed public interest concerns more heavily than commercial concerns, including certainty of contract.

While the application of this case is particularly significant in the consumer context, parallels could certainly be drawn in the shareholder action context, where shareholders individually have little bargaining power or voice in respect of corporate actions. In the corporate and securities context, it may be that the courts will find compelling public policy reasons to deny enforcement of such by-laws. These public policy considerations could include whether by-laws ought to be viewed as contractual in nature as between a company and its shareholders, an issue for which there is no clear authority in Canada. This consideration may take on particular importance where the shareholder had no knowledge of, or opposed, the adoption of an exclusive forum by-law.

Accordingly, securities market participants should be aware that exclusive forum by-laws may not entirely foreclose the possibility of multiple proceedings, as would-be plaintiffs may be emboldened by *Douez* to commence proceedings (including class actions) in their own jurisdiction, rather than in the jurisdiction set out in such a by-law. In particular, Canadian or US corporations that use exclusive forum by-laws, which is increasingly common, should anticipate the risk that Canadian investors may seek to have their litigation heard in a particular domestic or foreign jurisdiction of their choosing despite such by-laws.

Securities market participants should also be aware of the role that legislation may or may not play in the assessment of an exclusive forum clause. In *Douez*, although the British Columbia *Privacy Act* conferred jurisdiction on the British Columbia Supreme Court to resolve matters brought under that statute, the Supreme Court held that there was nothing to suggest that the provision in question was also intended to override forum selection clauses.

As such, in other shareholder actions, such as oppression claims initiated in the context of a merger, acquisition, or other transformative transaction, an exclusive forum by-law may be upheld notwithstanding conferral of jurisdiction on a particular court pursuant to statute, provided that the statutory provision conferring jurisdiction does not appear designed to oust such a clause. On the other hand, where legislation creates a statutory right of action, such as secondary market liability claims under s. 138.1 of the Ontario *Securities Act*, an exclusive forum by-law may not be enforced if the courts view such an action as necessarily tied to the jurisdiction in question.

In any case where an exclusive forum by-law is challenged, would-be defendants should be prepared to demonstrate that public policy does not militate toward denying enforcement and that there are other factors connecting the cause of action to the jurisdiction set out in the exclusive forum by-law, including the

enforceability of a judgment obtained in that jurisdiction. Until the precedential effect of *Douez* is better understood following application by the lower courts, exclusive forum by-laws cannot be relied on to foreclose entirely the possibility of multiple proceedings against a corporation.

For further information regarding the exclusive forum by-laws or if you have any questions, please contact Wendy Berman, John M. Picone, Kate Byers or any other member of our Securities Litigation Group.

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[1] 2017 SCC 33 [*Douez*].
[2] R.S.B.C. 1996, c. 373.
[3] The Supreme Court applied the test set out in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27.
[4] In doing so, the justices comprising the majority gave different reasons to support their conclusion. As a result, the precedential effect of this case will remain uncertain until it has been applied by lower courts.

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