

Further Enhancing the Promise of Forum Selection Clauses Through Stockholder Consent to Jurisdiction: The *Edgen* Lesson

As we discussed in prior memoranda,

(1) the problems posed by multi-jurisdictional disputes involving claims based on internal corporate affairs (such as M&A litigation and derivative actions) are pervasive and profound,

(2) forum selection clauses (FSCs) offer a promising solution to these problems, and

(3) the efficacy of this solution is materially enhanced by the further adoption of a consent to jurisdiction clause that permits the defendants to enforce the FSC in the chosen forum.¹

In recommending, for most Delaware companies,² the adoption of jurisdictional consent clauses we specifically noted that the key to FSCs providing meaningful benefits would be whether the courts hearing cases filed in violation of those clauses would enforce them – and that, as a practical matter, those courts were likely to be less inclined to do so than the courts in the forum selected in the FSC. The ongoing litigation challenging the proposed merger of Edgen Group and Sumitomo Corporation powerfully illustrates the concern we identified, and the potential importance of including a jurisdictional consent clause along with an FSC.

Edgen is a Delaware corporation headquartered in Louisiana. Its corporate charter (adopted simultaneously with its IPO) included an FSC that designated the Delaware Chancery Court as the exclusive forum for internal affairs disputes. Ten days after its entry into a merger agreement with Sumitomo, however, litigation challenging the merger was brought in Louisiana state court. As is typical, the Louisiana complaint provided little details about the stockholder plaintiff (Genoud) other than that he was an Edgen stockholder domiciled in Canada. While Edgen asked the Louisiana court to dismiss the action in favor of proceeding in Delaware, as the FSC required, three weeks after the Louisiana suit was filed Edgen also brought an action in the Chancery Court seeking an injunction preventing Genoud from proceeding in Louisiana.

¹ Cleary Gottlieb memorandum [Should Your Company Adopt a Forum Selection Bylaw?](#), June 27, 2013; Cleary Gottlieb memorandum [Enhancing the Promise of Exclusive Forum Clauses by Having Stockholders Consent to the Jurisdiction of the Selected Forum](#), August 12, 2013.

² Of course, as we have previously noted, many boards considering adoption of an FSC will want to consider their company's stockholder profile and the known or perceived views of their stockholders regarding such provisions.

While Edgen had a forum selection clause, it had not adopted a jurisdictional consent provision. Accordingly, it was forced to argue that there was jurisdiction over Genoud in Delaware simply because Genoud purchased or acquired shares in Edgen – because Edgen had an FSC. Lacking any specific details about Genoud’s residence, Edgen was also forced to undertake considerable efforts – including hiring investigators – to locate Genoud in order to effect service of process on him. And, despite doing so, Genoud’s location remained elusive. Ultimately, Edgen had to seek an order from the Chancery Court permitting service upon him through the mail. Apart from the expense of demonstrating that service by mail was justified, the time it took to serve Genoud led to delays that, especially in the M&A litigation context, were most unwelcome.

The Chancery Court is well-known for accommodating the exigencies of M&A litigation, and in Edgen’s case scheduled a hearing on its application for a TRO against Genoud before Edgen’s challenge to the appropriateness of Genoud bringing suit in Louisiana was heard in the Louisiana court. The jurisdictional uncertainties, however, proved costly. In his bench ruling on the motion, Vice-Chancellor Laster found that Edgen had demonstrated a likelihood of success on its claim that Genoud’s filing of the Louisiana action breached the FSC, and that permitting the Louisiana action to go forward would cause irreparable harm to Edgen. Likelihood of success on the merits and irreparable harm are central requirements for the issuance of injunctive relief; when they are present, injunctions generally follow.

But the Chancery Court denied Edgen the TRO it sought. Analyzing the final component relevant to a request for equitable relief – a balancing of the equities – Vice-Chancellor Laster identified two grounds that led him to deny the TRO. First, he noted that no provision of Edgen’s charter or bylaws (including its FSC) provided for stockholder consent to personal jurisdiction in Delaware. Without holding that the absence of such a provision necessarily meant that there was no jurisdiction over Genoud in Delaware, the Chancery Court held that the absence of such a provision presented a litigable issue that affected the balancing of the equities. Second, Vice-Chancellor Laster was reluctant to enter a TRO that would essentially have the Chancery Court, based upon a preliminary order, interfering with proceedings in the courts of another state. In connection with his discussion of this concern, Vice-Chancellor Laster also noted that Chancellor Strine’s Chevron/Federal Express decision upholding FSCs (the focus of our June memorandum) seemed to contemplate that the enforcement of FSCs would take place in the “foreign” court – here, Louisiana.

Both of these concerns can be addressed through a jurisdictional consent clause that avoids creating a litigable issue regarding obtaining jurisdiction over (and service of) the stockholder breaching the FSC, and makes clear that the forum selected by the FSC is a – indeed, *the* – primary forum in which the FSC should be enforced. Further, as we previously advised in our August memorandum, the relief that should be sought is not a TRO or a preliminary injunction – both of which are provisional orders subject to revision – but a permanent injunction included in a final judgment (in an expedited proceeding that, in most if not all cases, would solely be based upon the FSC itself and the pleading filed in the foreign court). Unlike TROs or preliminary injunctions, final judgments enforcing FSCs should be embraced by the Constitution’s Full Faith and Credit clause, and accordingly should not raise the comity concerns Vice-Chancellor Laster identified as being present in the TRO context.

Consistent with the foregoing, corporations with FSCs, and those planning to adopt such clauses, should consider also adopting provisions that contain jurisdictional consents such as the second paragraph in the suggested FSC below:

- (a) Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the State of Delaware, in all cases subject to such court's having personal jurisdiction over the indispensable parties named as defendants. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw/Article].
- (b) If any action the subject matter of which is within the scope of paragraph (a) above is filed in a court other than a court located within the State of Delaware (a "Foreign Action") in the name of any stockholder, such stockholder shall be deemed to have consented to (i) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce paragraph (a) above (an "FSC Enforcement Action") and (ii) having service of process made upon such stockholder in any such FSC Enforcement Action by service upon such stockholder's counsel in the Foreign Action as agent for such stockholder.

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Please feel free to call any of your regular contacts at the firm or any of our partners and counsel listed under "[Corporate Governance](#)" in the Practices Section of the website if you have any questions.

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