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No Jurisdiction Over Controlling Shareholder Despite Lock-Up Agreement, Del. Court Says

An electronics company's foreign controlling shareholder is not subject to personal jurisdiction in a lawsuit over whether it should vote for or against a merger, even though the controlling shareholder signed a voting or lock-up agreement that contained a consent to Delaware jurisdiction, the Delaware Chancery Court ruled Feb. 2 (*Multi-Fineline Electronix Inc. v. WBL Corp. Ltd.*, Del. Ch., C.A. No. 2482-N, 2/2/07).

"[T]he consent to jurisdiction clause found in the lock-up contract," said Vice Chancellor Stephen Lamb, writing for the court, "does not provide a valid basis for the court to exercise personal jurisdiction over the controlling stockholder in this suit for breach of fiduciary duties."

Since the controlling stockholder "has no other substantive contacts with Delaware," the court dismissed the lawsuit for lack of personal jurisdiction.

Additionally, the court found the dispute, over whether the controlling shareholder will vote for or against the proposed merger, both moot and unripe at the same time. On the one hand, it noted, the shareholder's voting agreement, or lock-up agreement, has expired rendering that aspect of the issue moot. On the other, the vote may not take place, rendering that aspect unripe. "Although it is temporally impossible under normal circumstances for a case to be simultaneously moot and unripe," the court said, "the unique facts here, coupled with the arguments advanced by the plaintiff, require the court to address both of these grounds for dismissal."

Merging Companies Both Controlled by Same Parent

In March 2006, the court recounted from the allegations, flexible circuit-board maker Multi-Fineline Electronix Inc., known as M-Flex, announced a tender offer to buy all the stock of MFS Technology Ltd. M-Flex is a Delaware corporation headquartered in Anaheim, Calif., and MFS is a Singapore corporation. Both companies are controlled by WBL Corp. Ltd., a Singapore corporation, which owns 61 percent and 56 percent of their stock, respectively.

M-Flex's tender offer for MFS, made pursuant to Singapore law, allowed MFS shareholders to choose to tender their shares in exchange for either cash or M-Flex stock. At the time of the offer, M-Flex estimated that the $500 million acquisition would cost it only about $6 million in cash because most MFS shareholders would choose stock.

However, both M-Flex and MFS suffered significant financial setbacks affecting their stock prices. M-Flex now expected that all tendering MFS shareholders would choose cash, and that it would need over $200 million to close the deal. Thus, M-Flex's board strongly urged its shareholders to vote against the merger. M-Flex sought to withdraw its tender offer, but was denied permission by the Securities Industry Counsel, Singapore's regulatory agency. M-Flex then offered to let its majority shareholder, WBL, out of the lock-up agreement in which it promised to vote in favor of the merger. WBL, however, declined and publicly reiterated its intention to vote for the merger.

M-Flex then sued WBL in Delaware Chancery Court seeking an injunction and a declaration that WBL must vote against the merger to fulfill its fiduciary

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Analysis

Bilateral Investment Treaties

Familiarity With BITs Essential For U.S. Companies Considering Foreign Investments

BY JEFFERY W. SARLES

U.S. companies that invest in foreign countries operate under a global legal framework that has been vitally transformed in recent years. Traditionally, foreign investors who were mistreated by host states had no effective recourse outside the host state's courts. Today, a vast network of bilateral investment treaties (BITs), which give foreign investors private rights of action before neutral arbitral bodies, covers the globe. Successful planning and structuring of foreign investments must take this new legal regime into account.

Bilateral Investment Treaties

The first bilateral investment treaties with substantive investment protections and neutral procedural mechanisms appeared in 1969. After a slow start, BITs began to proliferate dramatically in the 1990s. Today there are over 2,400 BITs, as well as several important multilateral investment treaties, including NAFTA and the Energy Charter Treaty. The United States has entered into some 40 BITs. For U.S. companies planning foreign investments, it is important to know that the U.S. has entered into BITs with, for example, Argentina, Bulgaria, Cameroon, Egypt, and Jamaica, but not with such prominent investment targets as Brazil, China, or Nigeria.

The investments protected by BITs are broadly defined. They include not only productive facilities such as factories and mines, but also equity participation, intangible property, concession contracts, intellectual property, and licenses. However, simple cross-border sales of goods are generally not considered investments for these purposes.

BITs perform two critical functions. First, they provide substantive protections to investors. Second, they provide for the resolution of investor-state disputes before a neutral arbitral body.

Substantive Protections

BITs contain what amounts to an investment bill of rights. These substantive protections reduce the need to rely on the often amorphous principles of international law. Instead, investors may rely on guarantees inscribed in the treaties themselves.

The U.S. has entered into BITs with Argentina, Bulgaria, Cameroon, Egypt, and Jamaica, but not with such prominent investment targets as Brazil, China, or Nigeria.

BITs contain both comparative and absolute guarantees. Comparative guarantees require the host state to treat foreign investors no less favorably than domestic investors and other foreign investors. Absolute guarantees forbid uncompensated expropriations, arbitrary measures, local content requirements, and unfair judicial and administrative proceedings. They also require the host state to treat foreign investors fairly and equitably, provide full protection and security, and allow funds to be freely transferred into and out of the country.

Dispute Resolution Provisions

The dispute resolution provisions found in BITs make these substantive protections meaningful. By authorizing aggrieved investors to file claims before a neutral arbitral body, these treaties generally remove any need to submit such claims to the host country's courts, a highly unfavorable venue, and waive the host state's sovereign immunity with respect to such claims.

Most BITs allow the investor to file arbitration claims with the International Centre for Settlement of Investment Disputes (ICSID), an autonomous arm of the World Bank devoted to the resolution of investor-state disputes, often with the option to choose another international arbitration institution or to proceed under ad hoc rules promulgated by the United Nations Commission on International Trade Law (UNCITRAL). By executing the treaty, each signatory country promises to enforce all arbitral awards resulting from this process.

This system is working, as evidenced by the number of claims being filed. As of this writing, there are 110 investor-state cases pending before ICSID alone, and many others pending before such bodies as the International Chamber of Commerce or proceeding under the UNCITRAL Rules. Moreover, countries that have received adverse awards have paid the awards in most cases, bolstering the confidence of investors in the investor-state arbitration process.

Risk Reduction

This combination of substantive

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guarantees and a neutral dispute resolution process removes at least some of the risk historically associated with foreign investment. If the host country seizes your factory, freezes your bank account, adopts an unexpected and targeted regulation that puts you out of business, or hits you with a novel and discriminatory tax, you no longer are limited to seeking relief in the host country's courts under the host country's laws or pleading with the U.S. government to intercede on your behalf. You now can file BIT claims before neutral arbitrators with the authority to issue binding and enforceable awards.

That is not to say that the new regime is a perfect solution. Dispute resolution proceedings are often slow and costly, and the lack of a true appellate mechanism sometimes results in inconsistent interpretations of identical treaty provisions and a patchwork of hard-to-reconcile awards. But virtually everyone agrees that this imperfect but impartial process is far superior to the old regime of one-sided courts and diplomatic intervention (whether by gunboat or otherwise).

Impact on Foreign Investments

U.S. companies can take affirmative steps to make the most of the risk-reduction offered by BITs. Periodic audits of foreign investments to search for potential treaty claims are advisable. In addition, companies should incorporate "nationality planning" into their foreign investment structuring. Nationality planning involves an investigation into available BITs and their provisions before structuring a foreign investment.

For example, suppose you are a U.S. company intending to bid for a concession in Indonesia. The United States does not have a BIT with Indonesia. Does that mean you cannot obtain BIT protection for your intended investment? Not at all. Indonesia does have a BIT with the Netherlands. You may be able to obtain the protections of that Indonesia-Netherlands BIT by having your Dutch subsidiary (existing or newly created) bid on the concession.

Even if the country in which you intend to make the investment does have a BIT with the United States, it may also have a BIT with Germany that has more favorable investor protections. In that case, too, you may decide to make the investment through a German vehicle to take advantage of those greater protections. Alternatively, if you have already made the investment, you may be able to use the most-favored nation provision in the U.S. BIT to incorporate the more favorable provisions from the Germany BIT.

Of course, accounting for BITs is just one factor in deciding how to structure a transaction—tax concerns may be a higher priority. But in today's world of bilateral and multilateral investment treaties, nationality planning has a central role to play in assessing and reducing the inherent risk involved in investing abroad.

Conclusion

U.S. companies increasingly have operations in foreign countries, whether across the globe in Asia or nearby in the Caribbean. In structuring and managing those foreign investments, they can ill afford to disregard the multitude of bilateral and multilateral investment treaties that govern the legal relations between host states and foreign investors. Accounting for the availability of BIT protections in investment planning and taking advantage of those protections in the face of adverse host-state measures is now an essential aspect of global management.

Securities

Eleventh Circuit to Rehear Ruling Over WorldCom Ads

The U.S. Court of Appeals for the Eleventh Circuit agreed Feb. 16 to rehear en banc a panel's divided conclusion late last year that NASD and Nasdaq Stock Market Inc. were immune from being sued under Florida law over advertisements implying that WorldCom Inc. stock was a good investment (21 CCW 338, 11/8/06) (*Weissman v. NASD,* 11th Cir., No. 04-13575, 2/16/07).

According to the panel's decision, between December 2000 and June 2002, plaintiff Steven Weissman purchased 82,800 shares of WorldCom stock on behalf of his minor children. When WorldCom collapsed, he lost almost his entire investment. In his diversity lawsuit against NASD and Nasdaq, Weissman contended that he relied on the defendants' print and televisions ads in Florida—designed to induce investors to purchase stocks traded on Nasdaq—touting WorldCom as a "great company" whose accounting complied with generally accepted accounting principles.

The self-regulatory organizations countered with a motion to dismiss the allegations, which the lower court denied. The district court held that while NASD and Nasdaq were absolutely immune with respect to 1934 Securities Exchange Act-mandated regulatory or disciplinary functions, they were not entitled to such immunity in this case because Weissman's complaint related to private commercial conduct.

The Eleventh Circuit affirmed in part. It concluded that the defendants were, in fact, immune from suit over the dissemination of WorldCom's financial statements. However, it ruled, NASD and Nasdaq did not carry their burden of demonstrating entitlement to absolute immunity from Weissman's claims over their for-profit commercial activity.

Text of the court's order is available on the court's Web site at http://www.ca11.uscourts.gov/enbanc/issues/eb04-13575order.pdf.

Corporate Counsel Appointments

Jeffrey Dill, to vice president, general counsel, and secretary, Neurogen Corporation, Branford, Conn.

Charles Kallenbach, to general counsel and chief legal officer, Heartland Payment Systems Inc., Princeton, N.J.

Lisa Kim Pai, to executive vice president, general counsel, and corporate secretary, Central Financial Corporation, Los Angeles.

Announcements of corporate counsel appointments may be sent to Managing Editor, Corporate Counsel Weekly, The Bureau of National Affairs, Inc., 1231 25th Street N.W., Washington, D.C. 20037, or sent via e-mail to: ccw@bna.com.