BANKING ON CORPORATE

ROOT FOR THE FORUM CONVENIENS TEAM

By Neill May

nmay@goodmans.ca

Home court advantage is a much-discussed critical advantage in sports. In other contexts, home court also has clear benefits, including familiarity, efficiency and convenience. The premise is not universal. In "debates" with my family members, my record is the same regardless of the venue. But engaging in contests in your own backyard tends to be preferable for many reasons.

In the corporate securities realm, the issue arises with forum selection bylaws, which are provisions specifying the jurisdiction where certain shareholder litigation must occur. These provisions capture all forms of claims that shareholders can make against a corporation or its principals. Examples include claims for oppression, breach of fiduciary duty or non-compliance with the corporate statute. Forum selection bylaws do not cover other sorts of litigation that a corporation may become involved in through the normal conduct of its business, with customers, suppliers, competitors, regulators or others.

These provisions have evolved in the U.S., predictably, given its relatively litigious environment, with significantly different approaches adopted by state courts. Most corporate domiciles and litigation, however, occur in Delaware.

The home court reference hints at the benefits to a corporation of a forum selection bylaw. One of those benefits is convenience — corporations with forum designation provisions would not be forced to defend themselves in jurisdictions far from the location of their executive teams and corporate records, reducing costs. Another benefit is the ability to choose a preferred jurisdiction — certain jurisdictions may have developed an expertise in relevant issues, which enhances predictability, consistency and quality of outcomes. Additionally, forum selection avoids jurisdiction shopping and contemporaneous multi-jurisdiction suits by tactically inclined plaintiffs.

Not surprisingly, these bylaws have been tested in U.S. courts. Late last year, the Court of Appeal of California (where many challenges to forum selection bylaws have been made) became the second appellate court outside of Delaware to recognize the enforceability of forum-selection bylaws designating the Delaware courts as the exclusive forum for the litigation of intra-corporate disputes. That case illustrated the challenges that have been made to forum selection provisions. In approving the effective acquisition of Delaware-incorporated 1st Century Bancshares by Midland Financial, 1st Century's board adopted a bylaw establishing Delaware as the exclusive forum for shareholder-initiated actions. An action by a 1st Century shareholder for breach of fiduciary duty was stayed based on the forum-selection bylaw, and the plaintiff appealed.

The court's decision is a strong indication that forum selection bylaws have staying power. The court noted that a Delaware corporation's preference to litigate in that state should not have been surprising to shareholders (in court speak, "consistent with shareholders' reasonable expectations"), and that the consolidation of litigation in a single jurisdiction results in efficiencies benefiting both corporations and their shareholders.

In Canada, forum selection bylaws are starting to appear. The irony is that challenges to such bylaws would tend to be made in non-designated jurisdictions. There may be a political dynamic as well, where some Canadian jurisdictions have worked to protect and promote their expertise and the activity level of local institutions. Corporate watchdogs and proxy advisors in Canada function separately from their American brethren as well, and may adopt different perspectives if these bylaws are used more here. So far, Canadian market actors appear to be considering forum selection bylaws on a case-by-case basis.

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The location of shareholder litigation may be something that isn't thoroughly considered until it happens. In that way, it resembles the debate about "taking the pen" on an agreement, which is often discussed and dismissed as a factor that doesn't really matter until the one deal where it does. Also, I like using the phrase "taking the pen" because I hope it survives to the point where our not too distant descendants find it cute or confusing to think that we once actually wrote agreements. Maybe once shareholder litigation gets even more concentrated in certain locations, we can then focus on other efficiencies. Perhaps to avoid further debate and costly duplication of facilities, for example, all future Olympics could also be in Delaware. Until then, corporations designating jurisdictions for disputes can consider maximizing the advantages by riling up their fans in the crowd to do distracting waves when the "away team" is presenting its arguments.

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law, with an emphasis on M&A and corporate finance. The opinions expressed in this article are his alone.