SULLIVAN & CROMWELL LLP

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Dismissals Throw Cold Water on Efforts to Make New York a Hub for Non-U.S. Derivative Litigation

New York Supreme Court Dismisses Two Derivative Suits Brought Against Directors and Officers of Bayer AG and UBS Group AG for Alleged Breaches of Fiduciary Duty, Finding That Those Actions Must Be Brought in the Companies' Home Forums.

SUMMARY

Last week, the Commercial Division of the New York Supreme Court dismissed two shareholder derivative actions brought against directors and officers of large European companies in decisions with critical implications for non-U.S. companies' exposure to fiduciary litigation in the U.S. Those actions—against Bayer and UBS—are part of a flurry of derivative suits against major non-U.S. firms filed in New York state court over the past two years in an attempt to circumvent the requirements of these companies' respective home forums. These two dismissals may spell the beginning of the end of those efforts. Sullivan & Cromwell represented UBS in obtaining the dismissal of the action against it.

NEW YORK COURT OF APPEALS DECISION IN *SCOTTISH RE*

The recent influx of cases appears to be part of a coordinated effort by plaintiffs' counsel to take advantage of the New York Court of Appeals' 2017 decision in *Davis* v. *Scottish Re Group*.[1] There, the Court of Appeals held that a Cayman Islands law requiring that a shareholder seek leave from a Cayman Islands court before bringing a shareholder derivative suit was "procedural," and thus did not apply to an action brought in New York. Not long after, a New York appellate court, applying *Scottish Re*, determined that a similar requirement under U.K. law was also procedural and thus did not apply in U.S. litigation.[2] Emboldened by these decisions, plaintiff firms have sought to make New York an international center for

derivative actions, claiming that they need not comply with legal prerequisites imposed by the companies' home forums. Over the past two years, these firms have filed numerous derivative suits in New York state court against the directors and officers of large European corporations, including Barclays, Credit Suisse, Deutsche Bank, Novartis, Société Générale, Standard Chartered, and Volkswagen, in addition to Bayer and UBS.

BAYER DECISION

In *Haussmann* v. *Baumann*, stockholders of Bayer AG sought to hold directors and officers liable for alleged breaches of fiduciary duties under German law related to Bayer's 2018 acquisition of Monsanto. Defendants moved to dismiss on multiple grounds, including that the court lacked personal jurisdiction over Bayer's directors, that the action should be dismissed in favor of Germany under the doctrine of *forum non conveniens*, and that German law required plaintiffs to seek leave from a German court before bringing a shareholder derivative suit against the company.

On December 27, 2021, Justice Andrew Borrok dismissed the action in its entirety. Justice Borrok concluded that the court lacked personal jurisdiction over the individual directors because none live or conduct business in New York. Resolving a key uncertainty for German corporations following *Scottish Re*, Justice Borrok also rejected the plaintiffs' argument that the German derivative suit prerequisite was "procedural," foreclosing their effort to evade that requirement by filing suit in the U.S. Justice Borrok further held that the action—which involves claims under German law, against non-U.S. directors of a German company, based on alleged conduct in Germany—did not belong in a New York court under the doctrine of *forum non conveniens*, citing Germany's "significant interest in adjudicating a dispute involving an old and major German company."[3] That reasoning should apply to the similar, still pending, New York derivative suits against other non-U.S. companies.

UBS DECISION

Three days after the Bayer decision, Justice Jennifer Schecter dismissed a similar lawsuit brought by a UBS stockholder. In *Cattan* v. *Ermotti*, the plaintiff brought claims under Swiss law against directors and officers of UBS Group AG, this time based on a slew of unrelated incidents involving the bank over the course of a decade. Defendants moved to dismiss on several grounds, including that UBS's articles of association select Switzerland as the forum for "any disputes arising out of the corporate relationship," that the action should be dismissed for *forum non conveniens*, and that the claims failed under Swiss substantive law.

Justice Schecter granted the motion on the basis of UBS's forum selection provision, and thus did not reach the defendants' remaining arguments. She determined that the forum selection clause encompasses derivative fiduciary duty claims, which "necessarily" arise out of the corporate relationship, and thus that the plaintiff was required to bring the action in Switzerland.[4] As Justice Schecter explained, "an investor

can of course choose not to invest" in a company with a forum selection provision but by "choosing to invest in UBS, [the] plaintiff agreed to be bound by" the clause in UBS's articles. By giving effect to that clause, Justice Schecter validated another important tool for non-U.S. companies to ensure that their "internal-affairs disputes be adjudicated by a court with expertise in [their] corporate law."[5] Notably, a shareholder plaintiff recently voluntarily dismissed his similar derivative action against Société Générale after the bank moved to dismiss based on a similar forum selection provision in its corporate bylaws.

IMPLICATIONS

These two decisions, although subject to appeal, could signify the end of plaintiffs' short-lived efforts to turn New York into a hub for derivative litigation against non-U.S. corporations. Both resoundingly affirm that these types of actions belong in the corporations' home forums. And they signal that *Scottish Re* should not be viewed as carte blanche to bring derivative claims against directors and officers of non-U.S. corporations in New York without complying with applicable non-U.S. corporate law. The UBS decision also highlights the potential protection against burdensome U.S. derivative litigation a forum selection clause can provide. If the remaining actions follow suit, the dismissals will be a victory for principles of comity and will provide non-U.S. corporations with much-needed certainty about their exposure to U.S. derivative litigation.

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ENDNOTES

1 *Davis* v. *Scottish Re Grp.*, 30 N.Y.3d 247 (2017).

2 *Mason-Mahon* v. *Flint*, 166 A.D.3d 754 (2d Dep't 2018).

3 Index No. 651500/2020, 2021 WL 6110467, at *2 (Sup. Ct., N.Y. Cnty., Dec. 27, 2021).

4 Index No. 652270/2020, NYSCEF No. 150, at 1 (Sup. Ct., N.Y. Cnty., Dec. 30, 2021).

5 *Id.* at 2.

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