

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

INSTITUTO MEXICANO DEL SEGURO
SOCIAL,

Plaintiff,

v.

ZIMMER BIOMET HOLDINGS, INC.,

Defendant.

CAUSE NO. 3:20-cv-99 DRL-MGG

OPINION & ORDER

The Instituto Mexicano del Seguro Social (IMSS) manages the purchase of medical supplies for the Mexican government. IMSS alleges that Zimmer Biomet Holdings, Inc. bribed Mexican government officials to facilitate the sale of its medical device products in Mexico. Zimmer Biomet now moves to dismiss this suit on grounds of *forum non conveniens*, saying the case should be litigated in Mexico. The court agrees and grants the motion.

BACKGROUND

IMSS alleges that, from 2008 to 2013, Zimmer Biomet knowingly paid bribes to Mexican government officials to facilitate the sale of its products to and through IMSS. These bribes allegedly facilitated the importation of unregistered medical device products into Mexico. IMSS says bribes occurred through Zimmer Biomet's indirectly-owned subsidiary in Mexico, Biomet 3i Mexico, with Zimmer Biomet personnel traveling into the country to support the scheme, or through Mexican agents who acted as bagmen for passing on bribes to Mexican government officials.

The complaint alleges that Zimmer Biomet engaged in an international bribery scheme orchestrated from its corporate offices in Indiana. The scheme thus included bribes both in the United States and Mexico. IMSS alleges that Zimmer Biomet has entered into deferred prosecution agreements with the U.S. Department of Justice and settlement agreements with the Securities and

purchase unregistered medical products and thus wouldn't have purchased medical devices from Zimmer Biomet if it had known of the bribes here. IMSS also claims that, because of the bribery scheme, various contracts from 2008 through the present are voidable.

DISCUSSION

The court may dismiss or transfer a case when considerations of economy and convenience demonstrate another forum is better suited to hear it. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994). This doctrine of *forum non conveniens* applies “when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)) (quotations omitted); *see Am. Dredging*, 510 U.S. at 447-48.

The court ordinarily defers to the plaintiff’s choice of forum, *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997), though a foreign plaintiff’s choice deserves less deference, *Piper Aircraft*, 454 U.S. at 256; *Kamel*, 108 F.3d at 803, a turnabout mitigated by the United Nations Convention Against Corruption here. Zimmer Biomet carries the burden of overcoming this presumption favoring a plaintiff’s choice, and it is often a “heavy” one. *In re Hudson*, 710 F.3d 716, 718 (7th Cir. 2013); *see Deb v. SIRVA, Inc.*, 832 F.3d 800, 805 (7th Cir. 2016) (*forum non conveniens* is an “exceptional” doctrine). A plaintiff’s choice of forum shouldn’t be disturbed unless the balance of factors tilts strongly in the defendant’s favor. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Deb*, 832 F.3d at 806.

The court may dismiss an action under *forum non conveniens* when (1) an alternative forum is available and adequate, and (2) dismissal would serve both the private interests of the parties and the public interests of the forums, *see Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589

F.3d 417, 421, 424 (7th Cir. 2009), though the overriding focus remains convenience, *Piper Aircraft*, 454 U.S. at 241. In rare cases when the plaintiff wants to sue in the defendant's home jurisdiction and the defendant wants to be sued in the plaintiff's home jurisdiction, as here, the court "weigh[s] . . . the relative advantages and disadvantages of the alternative forums" because there is "no *prima facie* reason to think a plaintiff [is being] discriminated against by being sent to his home court or a defendant [is being] discriminated against by being forced to stay and defend in his home court." *Abad v. Bayer Corp.*, 563 F.3d 663, 671 (7th Cir. 2009).

A. *Mexico is an Available and Adequate Alternative Forum.*

An alternative forum must be available and adequate. *Stroitelstvo*, 589 F.3d at 421. A forum is "available" if "all of the parties are amenable to process and within the forum's jurisdiction." *Id.* This requirement may be satisfied by a party consenting to jurisdiction. *See, e.g., Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (Hungarian courts available where non-Hungarian party consented to jurisdiction in Hungary); *Stroitelstvo*, 589 F.3d at 421 (Bulgarian courts available when bank headquartered in Chicago with office in Bulgaria consented to jurisdiction in Bulgaria); *In re Factor VIII or IX Concentrate Blood Prods. Lit.*, 484 F.3d 951, 957 (7th Cir. 2007) (forum available when dismissal conditioned on defendant's acceptance of service in U.K.).

Here, Zimmer Biomet consented to jurisdiction in Mexico through its vice president and associated general counsel. *See Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 621 (6th Cir. 2018) (declarations that one will accept service in alternative forum are legally binding); *see also Fischer*, 777 F.3d at 867 (relying on declaration by defendant's officer consenting to jurisdiction). Zimmer Biomet says it won't contest service of process in Mexico. To ensure Mexico proves an adequate forum, the court may order Zimmer Biomet to consent to jurisdiction in Mexico, accept service of process, and satisfy a final judgment rendered by a Mexican court. *See In re Factor VIII*, 408 F. Supp.2d 569, 591 (N.D. Ill. 2006), *aff'd*, 484 F.3d at 957 (7th Cir. 2007).

IMSS concedes that Mexican courts are competent to hear complex commercial matters but contests their availability nonetheless, though its analysis seems more aptly aimed at the forum's adequacy. IMSS relies on Mexican attorney Sergio Antonio Linares Pérez who says Mexican courts historically haven't held foreign parents of Mexican corporations liable based on their control of subsidiaries in Mexico. Yet Mr. Pérez concedes that Mexican courts recognize consents to jurisdiction. Because the Mexican courts would have jurisdiction over this matter and the parties are amenable to process within Mexico following Zimmer Biomet's consent, Mexican forums are available.

A forum is "adequate" "when the parties will not be deprived of all remedies or treated unfairly." *Kamel*, 108 F.3d at 803. To find an alternative forum inadequate, the court must conclude that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Fischer*, 777 F.3d at 867 (quoting *Piper Aircraft*, 454 U.S. at 254). An unfavorable change in law alone doesn't make a forum inadequate. *In re Factor VIII*, 484 F.3d at 956.

José Ramón Cossío Diaz, a former associate justice of the Mexico Supreme Court of Justice and current professor of constitutional law at El Colegio de México, says Zimmer Biomet's consent will be upheld by Mexican courts and that IMSS, as a decentralized body of the Federal Public Administration in Mexico, is subject to Mexico's federal jurisdiction. Based on his reading of the complaint, he says the executed contracts took place under the Law of Acquisitions, Leases and Services of the Public Sector (Law of Acquisitions), and that Article 85 of such law says disputes will be resolved by Mexico federal courts. Ultimately, he opines that "the claims filed by the IMSS against Zimmer Biomet may have been filed, processed and properly resolved with the Mexican competent federal authorities." The court gives this opinion substantial weight in underscoring a Mexican venue's availability and adequacy. See *Kamel*, 108 F.3d at 803 (relying on expert affidavit explaining that Saudi law recognizes consents).

Both the claims under Mexico's Law of Acquisitions (count II) and breach of contract (count III) are asserted under Mexican law, so any remedy would be available in Mexico. IMSS says the remedy for fraud (count I) is the same under American and Mexican law. Justice Cossío Diaz says Mexican courts are adequate: "In my opinion, the Mexican federal courts are qualified and empowered to hear the claims for relief sought by the IMSS, both regarding the compliance with the covenants and everything related to the corruption facts." He says Mexican courts have the power to provide relief under Articles 50 and 60 of the Law of Acquisitions, and that this law also grants agencies the power to rescind contracts administratively when the provider breaches its obligations.

IMSS says the forum is inadequate because Mexican courts would be reluctant to hold Zimmer Biomet accountable for its subsidiary's acts, but the court doesn't equate this type of reluctance with inadequacy. Just because Mexican law or a Mexican court may prove more circumspect about the claims here is a measure of the merits, a measure of standards or weight, not a measure of whether the remedies would be so clearly inadequate such as to be no remedy at all. *See, e.g., Fischer*, 777 F.3d at 861 (finding Hungarian courts adequate and saying "the relief need not be as comprehensive or as favorable as a plaintiff might obtain in an American court"); *In re Factor VIII*, 484 F.3d at 956 (finding British forums adequate though they had less favorable standards of causation). Indiana law would also present obstacles to recovery; for instance, IMSS would need to pierce the corporate veil between Zimmer Biomet and its subsidiary or establishing overwhelming control, but that hurdle wouldn't suggest Indiana law must accordingly be viewed as inadequate.

In sum, as many other courts have held, a Mexican court here is an adequate forum. *See, e.g., Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 933 (7th Cir. 2011); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003) ("The fact that Mexico provides a wrongful death cause of action, albeit with severe damage caps, makes the country an adequate forum."); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 383 (5th Cir. 2002) ("We . . . are unwilling to hold as a legal principle that

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