
June 26, 2013

Delaware Court of Chancery Upholds Board Adopted Forum Selection Bylaws

In *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* and *IClub Investment Partnership v. FedEx Corporation*, the Delaware Court of Chancery held that where a Delaware corporation's certificate of incorporation provides that the board of directors can unilaterally adopt bylaws, the board is permitted to adopt a bylaw that specifies Delaware as the exclusive forum where a stockholder may file a derivative suit or a suit for breach of fiduciary duty by the company's board of directors and officers.

In *Boilermakers*, each defendant corporation's board of directors, exercising power granted under its charter, adopted bylaws providing generally that, unless the corporation consented to an alternative forum, the Delaware Court of Chancery would be the "sole and exclusive forum" for actions (1) brought derivatively by stockholders on behalf of the corporation; (2) asserting a breach of fiduciary duty; (3) arising out of the General Corporation Law of the State of Delaware (the "DGCL"); or (4) "asserting a claim governed by the internal affairs doctrine."

Chancellor Strine's opinion rejected arguments that the bylaws were invalid because they were beyond the board's authority under the DGCL and were adopted without stockholder consent. The Court instead held that the bylaws were valid because the DGCL provides that a corporation's bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees," requirements the bylaws "easily" met. As the corporations' certificates of incorporation authorized the boards to amend the bylaws unilaterally, stockholders were bound by the boards' actions.

Delaware boards of directors with the power to adopt bylaws may now wish to consider the adoption of a forum selection provision (a model clause is provided at the end of this memorandum); however, before the adoption of any such forum selection bylaw, boards should consider the likely responses from stockholders. There does not yet appear to be a consensus on the acceptability of these provisions from a corporate governance perspective. Although the boards in *Boilermakers* adopted the bylaws without stockholder approval, other corporations have put similar forum selection provisions to stockholder vote, and stockholders have approved a significant majority of such management proposals. The proxy advisory firms, however, generally disfavor such provisions, and their vote recommendations may serve as a predictor of certain institutional investor attitudes. Glass, Lewis's policy is to recommend against approval of such proposals, and while ISS's policy is to consider these proposals on a case-by-case basis, it requires corporations to meet certain corporate governance conditions and disclose that they have been

materially harmed by stockholder litigation outside its jurisdiction of incorporation before ISS will support an exclusive forum proposal. Glass, Lewis and ISS may also consider whether stockholder approval was sought in adopting such provisions as an indicator of good corporate governance and board responsiveness to shareholder rights when making director election recommendations and issuing corporate governance ratings.

Finally, whether the adoption of a forum selection bylaw will lead to a reduction in multi-forum litigation will depend in large part on whether non-Delaware jurisdictions give effect to them when challenges arise. For example, in the 2011 *Galaviz v. Berg* decision, a court in California applying Federal law declined to dismiss the case in part because it held that the defendant company's forum selection bylaw was unenforceable. In *Boilermakers*, the Court of Chancery suggested that courts in other jurisdictions should respect the internal affairs doctrine and uphold the forum selection clauses, because the clauses would be valid under Delaware law. The Court also acknowledged that a stockholder could bring suit in another jurisdiction or in Delaware arguing that, in particular circumstances, application of a forum selection bylaw would be unreasonable.

* * *

Model Exclusive Forum Bylaw:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (a) any derivative action or proceeding brought on behalf of the Corporation, (b) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, employee or agent of the Corporation to the Corporation or the Corporation's stockholders, (c) any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware, the Certificate of Incorporation or these Bylaws, or (d) 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 the court having personal jurisdiction over the indispensable parties named as defendants therein. 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.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Lewis R. Clayton
212-373-3215
lclayton@paulweiss.com

Paul D. Ginsberg
212-373-3131
pginsberg@paulweiss.com

Andrew G. Gordon
212-373-3543
agordon@paulweiss.com

Justin G. Hamill
212-373-3189
jhamill@paulweiss.com

Stephen P. Lamb
302-655-4411
slamb@paulweiss.com

Jeffrey D. Marell
212-373-3105
jmarell@paulweiss.com

Raphael M. Russo
212-373-3309
rrusso@paulweiss.com

Robert B. Schumer
212-373-3097
rschumer@paulweiss.com

Frances Mi
212-373-3185
fmi@paulweiss.com

Meghan M. Dougherty, Cara Grisin, and Justin A. Shuler contributed to this memorandum.