

January 8, 2015

Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws

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EXECUTIVE SUMMARY

Forum selection clauses in corporate charters or bylaws can be an effective way for companies to reduce litigation costs and increase outcome predictability by requiring derivative suits and other claims relating to corporate governance to be litigated in a single forum, selected by the company. But recent judicial decisions make clear that these clauses, although generally within the power of a board to adopt, have to be carefully drafted to maximize the likelihood that a court will enforce them.

This article recommends that forum selection clauses be reflected in a bylaw that is adopted in the normal course, rather than in anticipation of any controversial board action that foreseeably may lead to litigation. An effective, enforceable forum selection clause should be drafted to apply only to disputes arising out of the company's governance and internal affairs, of the sort governed by the law of the state in which the company is incorporated. For companies incorporated in Delaware, the bylaw should designate the Delaware Court of Chancery in the first instance, and the United States District Court for the District of Delaware where state court jurisdiction is lacking. This article also recommends including a waiver provision that affords the board the flexibility to waive application of the forum selection clause in cases in which its application would be inappropriate.

* The authors gratefully acknowledge the assistance of Paul, Weiss litigation associates Anika Rappleye and Daniel Mason in the preparation of this article.

As to enforceability, this article recommends including language in the forum selection clause that will maximize a company's ability to proceed by way of anti-suit injunction in Delaware, rather than a motion to dismiss a lawsuit in a foreign forum. In particular, companies should include language pursuant to which stockholders are deemed to have consented to personal jurisdiction in the favored forum and to service of process on their counsel in any foreign action initiated in violation of the forum selection clause.

Introduction

Exclusive forum provisions reflected in corporate charters and bylaws require designated categories of corporate disputes to be litigated in a specifically identified court. The growing trend for companies to adopt such provisions may be traced to a 2010 Delaware Court of Chancery opinion, *In re Revlon, Inc. Shareholders Litigation*, in which Vice Chancellor Laster suggested, in dicta, that “[i]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”¹

In the wake of *Revlon*, many practitioners concluded that charter or bylaw provisions providing for an exclusive forum would be enforceable under Delaware law. Critics who argued that the selection of an appropriate judicial forum was not a matter of internal corporate governance, and thus beyond boards' powers to regulate, were bolstered by an opinion from the United States District Court for the Northern District of California in January 2012. In *Galaviz v. Berg*,² the Court declined to dismiss a stockholder derivative suit against Oracle Corporation on the basis of its exclusive forum bylaw, which required the suit to be brought in the Court of Chancery. Rejecting Oracle's attempt to analogize between bylaws and contracts, the District Court reasoned that a board's unilateral adoption of a bylaw “stands on a different

¹ *In re Revlon, Inc. Shareholders Litig.* (“*Revlon*”), 990 A.2d 940, 960 (Del. Ch. 2010).

² 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

footing” because “there is no element of mutual consent to the forum choice at all.”³ The *Galaviz* Court did not address the underlying issues of Delaware law, relying instead on federal common law for its decision. It would be over a year before the Delaware Court of Chancery would weigh in.

On June 25, 2013, then-Chancellor Strine issued an opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, in which he rejected a challenge to the facial validity of such clauses, and upheld the forum selection bylaws of two large, public corporations.⁴ In so doing, the Court explicitly disagreed with *Galaviz*, finding that the court’s conclusion “rest[ed] on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders.”⁵

Since *Chevron*, Delaware courts have consistently upheld such clauses and courts in five other states have followed Delaware and similarly upheld the validity of forum selection provisions. Not surprisingly, the number of corporations adopting forum selection clauses has grown considerably. In the three years between *Reylon* and *Chevron*, approximately 250 publicly traded corporations adopted forum selection provisions.⁶ The trend is now accelerating: nearly half that many have adopted forum selection provisions in the last six months alone.⁷ And for good reason. Effective forum selection clauses allow companies to channel litigation to their preferred forum, usually the Delaware Court of Chancery, thereby allowing companies incorporated in Delaware to have intra-corporate disputes resolved by the court most familiar with the applicable law. Moreover, by requiring disputes to be litigated in one court, exclusive forum clauses can effectively combat the increasingly common scenario in which corporations are forced

³ *Id.* at 1171.

⁴ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.* (“*Chevron*”), 73 A.3d 934 (Del. Ch. 2013).

⁵ *Id.* at 956.

⁶ *See id.* at 944.

⁷ According to searches conducted on SharkRepellent.net, 122 companies amended their charters and bylaws to include exclusive forum provisions between June 1 and November 30, 2014.

to defend against the same allegations in multiple lawsuits filed in different courts.⁸ Such multi-forum litigation is inherently wasteful and subjects defendants to the risks not only of conflicting outcomes, but of litigating before judges with little or no experience with the relevant issues, in remote and inhospitable forums.

While the facial validity of forum selection clauses in corporate charters and bylaws is now largely settled, *Chevron* laid the groundwork for future “as-applied” challenges. Although then-Chancellor Strine declined to rule on the hypothetical, troubling fact patterns proffered by the *Chevron* plaintiffs, he made clear that where such scenarios were actual, not hypothetical, forum selection clauses may be unenforceable. Under *Chevron* and its progeny, plaintiffs may mount as-applied challenges by arguing that a forum selection clause “should not be respected because its application would be unreasonable,” or “should not be enforced because the bylaw was being used for improper purposes inconsistent with the directors’ fiduciary duties.”⁹ Additionally, despite their presumptive validity, forum selection clauses in charters and bylaws are not self-enforcing, and companies therefore must anticipate efforts by plaintiffs to end-run such clauses.

The Delaware Court of Chancery issued two important decisions pertaining to as-applied challenges and enforceability in September 2014 and November 2013, respectively.¹⁰ These and other post-*Chevron* decisions provide useful guideposts for drafting effective forum selection clauses. From this developing line of cases, this article distills strategies that may be employed to minimize a corporation’s

⁸ See Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions—Review of 2013 M&A Litigation*, CORNERSTONE RESEARCH (2014), available at <http://www.cornerstone.com/Shareholder-Litigation-Involving-M-and-A-2013-Filings> (noting that stockholders filed suit in more than 90% of M&A deals valued over \$100 million for the fourth consecutive year, M&A deals attracted an average of more than five lawsuits, and 62% of deal litigation was multi-jurisdictional).

⁹ *Chevron*, 73 A.3d at 958 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)).

¹⁰ *City of Providence v. First Citizens BancShares, Inc. (“First Citizens”)*, 99 A.3d 229 (Del. Ch. 2014) (addressing an as-applied challenge); *Edgen Grp. Inc. v. Genoud (“Edgen”)*, Civil Action No. 9055-VCL (Del. Ch. Nov. 5, 2013) (addressing enforcement mechanisms).

litigation exposure resulting from as-applied challenges and to maximize the likelihood of obtaining cost-effective enforcement. A carefully constructed forum selection clause should avoid many of these potentially costly issues.

DRAFTING AND ADOPTION

Methods of Adoption

A company considering adopting a forum selection clause first must decide whether to amend the corporate charter or adopt a bylaw—either method is facially valid. While amending the corporate charter requires stockholder approval, bylaws may be amended by unilateral board action.¹¹ Of the 122 companies that adopted forum selection provisions between June 1 and November 30, 2014, 104 did so by unilateral bylaw amendment.¹² There are good reasons why most companies go the bylaw route.

The question of whether charter provisions were more likely to be upheld than bylaws was initially raised in *Revlon*, when Vice Chancellor Laster remarked that corporations are free to respond with forum selection charter provisions if and when “boards of directors *and stockholders* believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution.”¹³ In *Chevron*, however, then-Chancellor Strine explained that stockholder approval is essentially built in to either method of adoption. That is, one rationale for his finding that the unilaterally adopted amendments were valid was that stockholders, if unhappy with the bylaw amendments, could vote to repeal them.¹⁴ The *Chevron* plaintiffs specifically advanced the argument that unilateral board adoption via bylaw amendment should be invalidated, in favor of adoption by charter amendments, which would require stockholder approval. Then-Chancellor Strine rejected this argument, which “ignore[d] that a

¹¹ See 8 DEL. C. §§ 109(a), 242(b).

¹² According to searches conducted on SharkRepellent.net, between June 1 and November 30, 2014, 104 companies amended their bylaws to include exclusive forum provisions, while 18 companies effected the change by charter amendment.

¹³ *Revlon*, 990 A.2d at 960 (emphasis added).

¹⁴ *Chevron*, 73 A.3d at 954, 955 n.93.

certificate provision is harder for stockholders to reverse,” since charter amendments require both “a *board resolution* and stockholder vote,” whereas “in the case of a board-adopted forum selection bylaw, the stockholders can act unilaterally to amend or repeal the provision.”¹⁵

Post-*Chevron* decisions have reaffirmed then-Chancellor Strine’s conclusion that there is nothing improper about a board’s adoption of a forum selection bylaw amendment. This conclusion was reached even in those cases in which plaintiffs prevailed in challenging the bylaw’s application.¹⁶ Accordingly, given the expense of adoption by charter amendment (as well as the risk that stockholders could reject the forum selection provision), companies should generally pursue adoption via bylaw.¹⁷

A well-advised board should always document the rationale for the board’s decision to adopt a forum selection clause in board minutes and a resolution, explaining how the clause will serve the best

¹⁵ *Id.* at 955 n.93 (citing 8 DEL. C. §§ 242(b)(1), 109(a)).

¹⁶ For example, the Oregon Circuit Court explicitly noted that “there is nothing inherently wrong with unilaterally enacting forum selection bylaws,” but went on to hold that “the closeness of the timing of the bylaw amendment to the board’s alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit, and keeping in mind that its enforcement will have the effect—and Defendants knew it would have the effect—of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust.” *Roberts v. TriQuint Semiconductor, Inc. (“TriQuint”)*, No. 1402-02441, slip op. at 9-10 (Or. Cir. Ct. Aug. 14, 2014).

¹⁷ In this regard, boards should be aware that voting recommendations by the two most prominent proxy advisors may be affected by the adoption of a forum selection clause without stockholder approval. Glass Lewis & Co. has recently advised that it “will consider recommending” a vote against “[t]he governance committee chair, when during the past year the board adopted a forum selection clause” unilaterally. Glass Lewis & Co., *Proxy Paper Guidelines: 2015 Proxy Season*, available at http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf. Institutional Shareholder Services, Inc. (ISS) will generally recommend a vote against (or the withholding of votes from) one or more directors or the entire board if the board has unilaterally adopted any amendment “that materially diminishes shareholders’ rights or that could adversely impact shareholders,” after considering certain factors. Institutional Shareholder Services, Inc., *United States Summary Proxy Voting Guidelines: 2015 Benchmark Policy Recommendations*, December 22, 2014, available at <http://www.issgovernance.com/file/policy/2015summaryvotingguidelines.pdf>. While it is not clear whether ISS will take the position that adoption of a forum selection clause would “materially diminish” or “adversely impact” stockholders or their rights, to date, ISS has not recommended a withhold-vote against any directors based on the adoption of such a clause.

interests of the company and its stockholders. A decision to effect such a clause is much more likely to pass muster under the business judgment rule if it can be shown that it was adopted by independent, unconflicted directors, who weighed the relevant considerations and understood the advantages to the corporation of such a provision. In this regard, courts seem willing to accept as reasonable adoptions motivated by the goal of reducing expensive multi-forum litigation. For example, in *North v. McNamara*, Judge Barrett of the Southern District of Ohio agreed with then-Chancellor Strine that a corporation acted reasonably when it adopted a forum selection bylaw “for the purpose of consolidating litigation—particularly litigation brought on behalf of the corporation—into a single forum to reduce costs and prevent duplication,” noting that “[n]ot only would such consolidation be in the interests of the corporation, it also would be in the interests of shareholders to have the issues resolved efficiently and consistently.”¹⁸

Types of Claims Permissibly Covered by Forum Selection Clauses

For companies incorporated in Delaware, 8 Del. C. § 109(b) confirms that bylaws may contain provisions “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.” This statute “has long been understood to allow the corporation to set self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.”¹⁹

The rationale for upholding forum selection provisions in corporate charters and bylaws is inseparably linked to the bedrock concept that boards must have some measure of control over litigation that relates to the company’s internal affairs, including whether that litigation should be channeled to a court experienced in the law relevant to those affairs and a forum that has some meaningful link to the company. The forum selection bylaws at issue in *Chevron* were valid as a matter of statutory law because

¹⁸ No. 1:13-cv-833, --- F. Supp. 3d ---, 2014 WL 4684377, at *6 (S.D. Ohio Sept. 19, 2014).

¹⁹ *Chevron*, 73 A.3d at 951 (internal quotation marks omitted).

they “regulate where stockholders can exercise their right to bring certain internal affairs claims” by channeling them “into the courts of the state of incorporation, providing for the opportunity to have internal affairs cases resolved authoritatively by [the Delaware] Supreme Court.”²⁰ The validity of the bylaws likewise depended on the intra-corporate nature of the covered disputes because, under Delaware law, “[s]tockholders are on notice that, as to those subjects that are subject of regulation by bylaw under 8 Del. C. § 109(b), the board itself may act unilaterally to adopt bylaws addressing those subjects,” which are “the kind of change[s] that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own.”²¹

In contrast, forum selection provisions that seek to regulate where stockholders can bring claims that are *unrelated* to the corporation’s internal affairs are likely to be invalidated, on the theory that the adoption of a bylaw governing such external claims is beyond the board’s authority under 8 Del. C. § 109(b), and thus outside the scope of the framework to which stockholders implicitly assent. By way of example, then-Chancellor Strine stated in *Chevron* that a board would be regulating external matters if it adopted a bylaw that would bind a stockholder “who sought to bring a tort claim against the company based on a personal injury she suffered that occurred on the company’s premises or a contract claim based on a commercial contract with the corporation.” Such a bylaw would be beyond the authority of 8 Del. C. § 109(b), because it “would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*.”²²

Thus, forum selection clauses may be open to litigation challenges if they encompass categories of claims beyond the internal corporate governance categories approved in *Chevron*. As such, corporations

²⁰ *Id.* at 950-51.

²¹ *Id.* at 955-56.

²² *Id.* at 952.

adopting such clauses should enumerate the four categories approved by then-Chancellor Strine, defined in Chevron's bylaw as:

(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any other action asserting a claim governed by the internal affairs doctrine²³

Though most corporations tend to borrow nearly verbatim from the Chevron bylaw, some variation in the categorical breakdown exists.²⁴ As long as companies do not seek to expand beyond the type of intra-corporate disputes permissibly covered by forum selection clauses, such variation still will pass muster.

Which Forum?: Principal Place of Business versus State of Incorporation

Chevron established that a board generally exercises reasonable business judgment when it designates the courts of the state of incorporation as the exclusive forum for litigating the company's internal affairs. A recent decision from the Delaware Court of Chancery introduced a second permissible forum, namely, the courts of the state in which a company's principal place of business is located. In *First Citizens*, Chancellor Bouchard upheld a Delaware corporation's bylaw designating its principal place of business, North Carolina, as the exclusive forum for intra-corporate litigation. Chancellor Bouchard found that it was reasonable to designate North Carolina, given that most of the company's branches were

²³ *Id.* at 942 (quoting Chevron Corp., Current Report (Form 8-K) (Mar. 28, 2012)).

²⁴ For example, many corporations explicitly list "any action asserting a claim arising pursuant to any provision of the Certificate of Incorporation or Bylaws (as either may be amended from time to time)," either as part of the DGCL category, or as a separate, fifth category. See, e.g., Autobyte Inc., Current Report (Form 10-Q) (Nov. 5, 2014) (listing such actions as part of the DGCL category); Supreme Industries, Inc., Current Report (Form 8-K) (Nov. 10, 2014) (listing such actions as a separate category).

located there, its directors were subject to personal jurisdiction there, and complete relief was available in the North Carolina courts.²⁵

It may be logical for a corporation with most of its operations in a single geographic area to designate a court in the state of its principal place of business, since efficiency concerns may favor restricting litigation to the forum where the witnesses and potentially-relevant documents are likely to be located. Where it can be shown that the board designated such a forum because it understood the relevant advantages to the corporation of that choice, *First Citizens* suggests that courts will find it a reasonable exercise of business judgment. Nevertheless, companies incorporated in Delaware usually should designate Delaware state courts in the first instance, based on the experience of the Delaware judiciary in corporate law issues and the depth of case law offering greater predictability.

Boards may now be tempted to designate more than one forum, thereby reserving the possibility of suit in either the state of incorporation or the principal place of business. We think that boards should resist this temptation, both because it is plaintiff who will be selecting the forum and because it could (and in the M&A context, likely will) result in litigation in *both* forums at the same time. As the *Chevron* defendants pointed out, the fact that corporations (and their directors and officers) often are subject to personal jurisdiction both in their states of incorporation and where they are headquartered is precisely what leads to the costly and wasteful multi-forum litigation that forum selection clauses are intended to prevent.²⁶ Thus, leaving open the possibility of both forums will defeat the purpose of adopting a forum selection clause in the first place.

Claims Arising Under Federal Law

A board must be cognizant of the fact that many claims to which a company may be subject arise under federal law and that many of those claims cannot be litigated in state courts at all. Indeed, the

²⁵ *First Citizens*, 99 A.3d at 240.

²⁶ *Chevron*, 73 A.3d at 943-44.

Chevron plaintiffs attacked the forum selection clause on the ground that it could result in *no* court having jurisdiction over a dispute. Then-Chancellor Strine dismissed that hypothetical challenge, pointing out, *inter alia*, that “the kind of cases in which claims covered by the forum selection clause predominate are already overwhelmingly likely to be resolved by a state, not federal, court.”²⁷ In any event, *Chevron*’s bylaw had been amended to allow a filing in the federal courts of the state of incorporation.

Companies adopting forum selection clauses should be mindful of this alternative federal forum solution to the hypothetical scenario identified by the *Chevron* plaintiffs. A properly drafted bylaw will eliminate potential as-applied challenges based on the absence of subject matter jurisdiction. Such a bylaw should employ sufficiently specific language to make the federal forum the choice *only* if the state court lacks jurisdiction. Thus, we recommend designating the exclusive forum as “the Court of Chancery in the State of Delaware (or, if the Court of Chancery does not have jurisdiction, the federal district court for the District of Delaware).”²⁸ We recommend against designating the exclusive forum as “a state or federal court located within the state of Delaware,”²⁹ because such language leaves it open to plaintiffs to

²⁷ *Id.* at 961.

²⁸ See Supreme Industries, Inc., Current Report (Form 8-K) (Nov. 10, 2014); see also, e.g., Morgans Hotel Group Co., Current Report (Form 10-Q) (Nov. 7, 2014) (designating “the Court of Chancery of the State of Delaware, or, if the Court of Chancery of the State of Delaware does not have jurisdiction, the Superior Court of the State of Delaware, or, if the Superior Court of the State of Delaware does not have jurisdiction, the United States District Court for the District of Delaware”). Similarly-specific bylaws have been adopted designating non-Delaware forums. See, e.g., Darden Restaurants, Inc., Current Report (Form 8-K) (Nov. 13, 2014) (designating “the Complex Litigation (Business Court) Subdivision (the ‘Business Court Subdivision’) of the Civil Division of the Ninth Judicial Circuit Court in and for Orange County, Florida (to the extent that the rules of the Business Court Subdivision allow for such case to be brought in such subdivision), or, to the extent that the Business Court Subdivision cannot or otherwise will not take such case, then the general civil division of the Ninth Judicial Circuit in and for Orange County, Florida (or, if no state court located within the State of Florida has jurisdiction, the federal district court for the Middle District of Florida)”).

²⁹ Mitek Systems, Inc., Current Report (Form 8-K) (Nov. 10, 2014).

bring suit in federal court (assuming there is a jurisdictional basis) even where the plaintiffs' claims could properly be heard by the state court.

Waiver Provisions

All boards should give serious consideration to including a waiver provision, such as the one contained in Chevron's bylaw, which permit boards to consent to suit in some other jurisdiction. Commentators have characterized a waiver as a "fiduciary out"³⁰ that allows the board to consent to proceeding in a foreign forum if prudence or its fiduciary obligations so require.

Waiver provisions may be useful for boards in a wide variety of circumstances. For example, if the board determined that litigating a particular action would be significantly less expensive in an alternative forum because all of the witnesses and documents are located in that foreign forum, the board could decide (assuming it was comfortable with the law and courts in the foreign forum) to waive application of the forum selection clause.

There is also a significant tactical advantage to the inclusion of a waiver clause. If and when, suits are filed in defiance of the clause, the board has bargaining power: it can condition its exercise of the waiver on the plaintiffs agreeing that they will all move forward in the single alternative forum most palatable to defendants.

Today, waiver provisions are almost invariably included in forum selection clauses. Generally the bylaw will begin with: "Unless the Corporation consents in writing to the selection of an alternative forum"³¹

³⁰ Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 402 (2013).

³¹ *E.g.*, Bankfinancial Corp., Current Report (Form 8-K) (Nov. 4, 2014); Insys Therapeutics, Inc., Current Report (Form 8-K) (Nov. 10, 2014); Pacific Ethanol, Inc., Current Report (Form 8-K) (Nov. 12, 2014).

Personal Jurisdiction over Defendants

The issue of a forum selection clause's enforceability in the absence of personal jurisdiction was first raised by the *Chevron* plaintiffs as a challenge to validity. The plaintiffs argued that the bylaws would operate unreasonably where a defendant "is not subject to personal jurisdiction in the state of incorporation, but may be susceptible to service elsewhere."³² In rejecting this hypothetical argument, then-Chancellor Strine pointed out that such as-applied challenges must be decided in the context of actual disputes, since the bylaws might still operate reasonably in such a scenario; for example, "there may be no forum *anywhere* in which all possible defendants would be subject to personal jurisdiction."³³ In response to this potential future as-applied challenge, some post-*Chevron* forum selection provisions require the court to have "personal jurisdiction over the indispensable parties named as defendants,"³⁴ or state that the forum will have exclusive jurisdiction "to the fullest extent permitted by law."³⁵ As commentators have noticed, though, this type of language likely will not make a difference in the majority of cases. The better and more straightforward approach is through judicious exercise of the waiver clause to allow the board flexibility on a case-by-case basis.

Avoiding Imputations of Improper Motive or Breach of Duty

If a board adopts a forum selection clause on the eve of a major dispute, or in close temporal proximity to the approval of a transaction that is expected to spur litigation, the board runs a high degree of risk that its good faith will be challenged with allegations that it is attempting to curtail stockholders' rights. And, in fact, the last-minute adoption of forum selection clauses is perhaps the most common

³² *Chevron*, 73 A.3d at 960.

³³ *Id.*

³⁴ *See, e.g.*, Coherus BioSciences, Inc., Current Report (Form 8-K) (Nov. 13, 2014); Mitek Systems, Inc., Current Report (Form 8-K) (Nov. 10, 2014).

³⁵ *See, e.g.*, Supreme Industries, Inc., Current Report (Form 8-K) (Nov. 10, 2014).

basis for as-applied challenges. After all, if it is such a good idea to have a forum selection clause, why did the company wait to adopt it until it was expecting a lawsuit? This issue thus implicates the related issue, discussed above, of whether the board can show it is acting in good faith to preserve resources and achieve predictable litigation results, or whether it has some alleged nefarious motive.

In *Galaviz*, the pre-*Chevron* decision invalidating a forum selection bylaw in the Northern District of California, the Court based its holding, in part, on the fact that the provision was adopted “after the majority of the purported wrongdoing is alleged to have occurred.”³⁶ While *Galaviz* has been repeatedly distinguished,³⁷ these types of challenges persist. Plaintiffs arguing such as-applied challenges typically allege that the board engaged in self-interested, disloyal conduct—approving a merger, for example—which it knew would prompt litigation, and because the forum selection bylaw was adopted at or around the time of the action, it was motivated by an improper purpose, such as to discourage out-of-state plaintiffs from bringing the litigation, or to ensure that the litigation would be adjudicated in the state with the most beneficial law for the board.

To be sure, the most recent caselaw on this issue suggests that the proximity of adoption to the conduct prompting litigation is insufficient, without more, to sustain a successful challenge.³⁸

The Delaware Court of Chancery recently held that a forum selection provision was enforceable even where it was adopted *after*, as opposed to close-in-time to, the alleged wrongdoing. In *First Citizens*, Chancellor Bouchard rejected an as-applied challenge based on the simultaneous adoption of a forum selection bylaw and merger agreement, holding: “That the Board adopted it on an allegedly ‘cloudy’ day when it entered into the merger agreement . . . rather than on a ‘clear’ day is immaterial given the lack of

³⁶ *Galaviz*, 763 F. Supp. 2d at 1174.

³⁷ See, e.g., *North*, 2014 WL 4684377, at *4-7; *First Citizens*, 99 A.3d at 242 n.54.

³⁸ See, e.g., *North*, 2014 WL 4684377, at *5-7; *First Citizens*, 99 A.3d at 242; *Miller v. Beam, Inc.*, No. 2014 CH 00932, tr. at 45-46 (Cook Cnty. Ill. Mar. 5, 2014).

any well-pled allegations . . . demonstrating any impropriety in this timing.”³⁹ Following *First Citizens*, in *North v. McNamara*, Judge Barrett surveyed the caselaw on this issue and “conclude[d] that the forum-selection bylaw does not become unenforceable simply because it was adopted after the purported wrongdoing.”⁴⁰

Nevertheless, there is at least some non-Delaware caselaw on which plaintiffs could rely to support an argument against enforceability based on the timing of adoption. For example, the Oregon Circuit Court found in *TriQuint* that “the closeness of the timing of the bylaw amendment to the board’s alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit,” counseled against enforcement.⁴¹

ENFORCEABILITY

Anti-Suit Injunctions and Personal Jurisdiction over Plaintiffs

Even a well drafted bylaw is not self-enforcing. Experience shows that, even if a board adopts a forum selection bylaw, an aggressive plaintiff can and will file suit elsewhere anyway. It is of course open to the company to move to dismiss in the disfavored forum, asking the judge in that court to enforce the bylaw. But those decisions are by their nature discretionary. So what can be done to maximize the chance that the litigation will actually end up in the forum preferred by the board?

The Delaware Court of Chancery’s decision in *Edgen* points in the direction of the answer. *Edgen*’s charter contained a clause designating Delaware as the exclusive forum for intra-corporate disputes. When a plaintiff sued in Louisiana in violation of the clause, *Edgen* sought an anti-suit injunction in Delaware. While Vice Chancellor Laster accepted the validity and applicability of the provision to the suit at issue, he denied *Edgen*’s request for a TRO, finding that the proper course of action

³⁹ *First Citizens*, 99 A.3d at 241.

⁴⁰ *North*, 2014 WL 4684377, at *6.

⁴¹ *TriQuint*, slip op. at 9-10.

was to move in the first instance for dismissal in Louisiana.⁴² His decision was primarily based on two factors: (1) whether there was personal jurisdiction in the Delaware Court of Chancery over the plaintiffs in the Louisiana action; and (2) concerns of interstate comity.⁴³

With respect to personal jurisdiction, the absence of express consent language does not *defeat* personal jurisdiction, but it does create a litigable issue that may (and in *Edgen*, did) require the company to litigate enforceability in the foreign forum.⁴⁴ A company should include consent to personal jurisdiction language in its forum selection clause. Before *Edgen*, it was thought to be sufficient for companies to include language based on Chevron’s bylaw, which stated: “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].”⁴⁵ Following *Edgen*, however, companies should include more than this “deemed consent” language, which was included in the clause at issue in *Edgen*.

In *Edgen*, Vice Chancellor Laster “note[d] that the forum provision does not specifically call out consent on the part of the stockholders to personal jurisdiction.”⁴⁶ He compared *Edgen*’s charter provision to a contractual forum selection clause that was the subject of a 2013 Court of Chancery decision, *Carlyle*, which designated Delaware state courts as the exclusive forum for contract-related suits, and provided that the contracting investor “waives, to the fullest extent permitted by law, any objection that it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of,

⁴² See *Edgen*, tr. at 38-42.

⁴³ See *id.* at 36-37.

⁴⁴ *Id.* at 36.

⁴⁵ *Chevron*, 73 A.3d at 942 (quoting Chevron Corp., Current Report (Form 8-K) (Mar. 28, 2012)).

⁴⁶ *Edgen*, tr. at 35.

any and each of such courts for the purposes of any such suit, action proceeding or judgment.”⁴⁷ The *Carlyle* Court held: “Where the parties to the forum selection clause have consented freely and knowingly to the court’s exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court.”⁴⁸ Vice Chancellor Laster contrasted “the absence of an explicit consent to personal jurisdiction” in Edgen’s “deemed consent” language, with the *Carlyle* clause, which “actually addressed explicitly the matter of personal jurisdiction.”⁴⁹

Thus, companies should include express consent to personal jurisdiction language, rather than the “deemed consent” language previously employed. Additionally, to forestall another problem that arose in *Edgen*, a board should craft its bylaw to provide that stockholders are deemed to consent to service of process in an action to enforce the forum selection clause. Accordingly, we recommend including the following clause:

If any action the subject matter of which is within the scope of the preceding sentence is filed in a court other than a court located within the State of Delaware (a “Foreign Action”) in the name of any stockholder, such stockholder shall be deemed to have consented to (i) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce the preceding sentence and (ii) having service of process made upon such stockholder in any such action by service upon such stockholder’s counsel in the Foreign Action as agent for such stockholder.⁵⁰

Vice Chancellor Laster’s decision not to issue the injunction in *Edgen* was also motivated by his concern that it “creates potential issues of interforum comity if the other court feels slighted by the issuance of an anti-suit injunction,” and his general sentiment that, while an anti-suit injunction may be “appropriate” in

⁴⁷ *Nat’l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C. (“Carlyle”)*, 67 A.3d 373, 377 (Del. Ch. 2013) (internal quotation marks & emphasis omitted).

⁴⁸ *Id.* at 381.

⁴⁹ *Edgen*, tr. at 35-36.

⁵⁰ See MDU Resources Group Inc., Current Report (Form 8-K) (Aug. 19, 2014); see also, e.g., Autobytel Inc., Current Report (Form 10-Q) (Nov. 5, 2014); Morgans Hotel Group Co., Current Report (Form 10-Q) (Nov. 7, 2014); Virgin America Inc., Current Report (Form 8-K) (Nov. 19, 2014); Zayo Group Holdings, Inc., Current Report (Form S-8) (Nov. 4, 2014).

the “right case,” “primacy should be given in the first instance” to the non-designated forum to address the issue.⁵¹ Accordingly, practitioners should be cognizant that Delaware courts may decline to enter an anti-suit injunction where unwarranted in context, in deference to comity concerns, regardless of how a forum selection clause is crafted.

Courts Outside of Delaware

Finally, regardless of where a company is incorporated or headquartered, which forum it designates, or how it goes about enforcing a forum selection clause, nearly all of the states to have considered these provisions have found them to be enforceable, including California, Illinois, Louisiana, New York, and Texas.⁵² This near-uniformity among states indicates that, where an anti-suit injunction is not pursued or available, forum selection clauses are likely to be enforced by a foreign court.

MODEL FORUM SELECTION CLAUSE

Consistent with the foregoing, we recommend that corporations planning to adopt forum selection clauses consider utilizing the following model:

Forum for Adjudication of Disputes. Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law or the Certificate of Incorporation or Bylaws (as either may be amended from time to time), or (iv) any action asserting a claim governed by the internal affairs doctrine shall be the Court of Chancery in the State of Delaware (or, if the Court of Chancery does not have jurisdiction, the federal district court for the District of Delaware). If any action the subject matter of which is within the scope of the preceding sentence is filed in a court other than a court located within the State of Delaware (a “Foreign Action”) in the name of any stockholder, such stockholder shall be deemed to have consented to (i) the

⁵¹ *Edgen*, tr. at 37, 41-42.

⁵² *Groen v. Safeway Inc.*, No. RG14716641 (Cal. Super. Ct. May 14, 2014) (Order); *Miller*, tr. at 45-47; *Genoud v. Edgen Grp. Inc.*, No. 625,244 (La. Dist. Ct. Jan. 17, 2014) (Order); *Collins v. Santoro*, No. 154140/14 (N.Y. Sup. Ct. Nov. 13, 2014) (Order); *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at *1 (N.Y. Sup. Ct. Nov. 4, 2013); *Daugherty v. Ahn*, Cause No. CC-11-06211-C (Tex. Cnty. Ct. Feb. 15, 2013) (Order).

personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce the preceding sentence and (ii) having service of process made upon such stockholder in any such action by service upon such stockholder's counsel in the Foreign Action as agent for such stockholder.

CONCLUSION

These recommendations, distilled from *Chevron* and its progeny, should be employed by corporations considering the adoption of forum selection clauses to limit exposure to, and better position the corporation for, potential litigation arising from the enforcement of such clauses.

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

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