Forum Selection Bylaws Continue to Gain Ground, But Questions Remain

Bonnie J Roe, Partner
Daniel H Tabak, Partner
Jonathan H Hofer, Associate

As we previously discussed (Should Your Board Adopt an Exclusive Forum Bylaw?, July 2013; The Future of Exclusive Forum Bylaws, November 2013; Forum Selection Bylaws Gain Ground, September 2014), forum selection bylaws have become an established part of corporate governance in only a few short years. Since our last update, courts outside of Delaware have continued to weigh in on whether to honor forum selection bylaws, with most courts enforcing such bylaws. And, on June 24, 2015, Delaware Governor Jack Markell signed into law amendments to the Delaware General Corporation Law, providing legislative support for at least some applications of forum selection bylaws.1 As a result, boards of directors are increasingly able to control the fora in which internal corporate disputes, such as suits alleging breaches of fiduciary duties by directors and officers, will be adjudicated.

Judicial Acceptance of Forum Selection Bylaws

For some time, it has been clear that Delaware courts believe that determining the forum in which internal corporate disputes are brought is a proper topic for a bylaw. Almost two years ago, the current Chief Justice of the Delaware Supreme Court, who at the time was the Chancellor of the Court of Chancery, held that forum selection bylaws at two companies were not facially invalid.2 Almost a year later, the new Chancellor of the Court of Chancery applied a forum selection bylaw opting for a non-Delaware forum.3

It is not entirely surprising that the Delaware judiciary is willing to support bylaws that funnel corporate litigation to Delaware courts. But, Delaware courts have limited power to require other states to

---

1. The bill also amended Delaware law in other ways. Perhaps most significantly, the amendments will prohibit bylaws that impose liability on stockholders for attorneys’ fees or expenses in connection with certain types of claims. This partially reverses a recent, well publicized Delaware Supreme Court case.
enforce what until recently were novel bylaw provisions. Unless other states are willing to honor forum selection bylaws, there is little practical benefit to corporations.

While the results are not unanimous, most courts have been willing to enforce forum selection bylaws as written. In November 2014, a New York Supreme Court opinion dismissed a derivative action where a certificate of incorporation specified a Delaware forum for derivative actions. Barely a month later, a California Superior Court dismissed a putative securities class action based on a forum selection bylaw. And only a few weeks ago, a Circuit Court in Florida likewise dismissed claims based on a forum selection bylaw. As alluded to above, however, this trend is not universal. For example, less than a year ago, an Oregon court refused to dismiss based on a forum selection bylaw where the bylaw was adopted after the wrongdoing alleged in the underlying complaint.

The bottom line is that a board adopting a forum selection bylaw today can reasonably expect that the bylaw will be enforced, although lingering uncertainty means that there are no guarantees.

Delaware Legislation and Some Questions, New and Old

The Delaware executive and legislative branches have now added their endorsement of forum selection bylaws.

On June 24, 2015, Delaware Governor Markell signed into law a series of amendments to the Delaware General Corporation Law. Most notably for present purposes, this will add a new section, section 115, providing that:

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former

4. See id. at 242 n.54 (collecting cases).
director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

The headline effect here is that there is no longer any doubt that choosing a forum for certain internal corporate disputes is a valid use of a bylaw under Delaware law. As is often the case in law, however, some of the details here are important.

- **What About Non-Delaware Forums?** Bylaws of Delaware corporations may only opt for Delaware as an exclusive forum. This overrules a previous opinion by the Court of Chancery which enforced a bylaw of a Delaware corporation channeling lawsuits to North Carolina.\(^9\) The immediate result is that a bylaw provision cannot take suits out of Delaware, although it might still narrow the choice to Delaware and one other jurisdiction.\(^10\) Accordingly, even if directors might prefer that suits be brought in the same state as the corporation’s (non-Delaware) headquarters, for example, directors must also allow for a Delaware forum. From a longer term perspective, this might make courts in other states less comfortable with exclusive forum bylaws.\(^11\)

- **Are There Any Exceptions?** Although not directly addressed in the text of the amendment, the legislative history for the bill suggests that bylaws “may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation,”\(^12\) and the language of section 115 itself makes the choice of a Delaware forum subject to “applicable jurisdictional requirements.” The exact contours of this exception, however, will need to be fleshed out in future litigation.

- **What are “Internal Corporate Claims”?** New section 115 defines “internal corporate claims” to capture only claims for breach of fiduciary duty and other claims over which the Delaware

---

10. Although this is not spelled out in the text of section 115, the legislative history strongly supports the idea that a non-Delaware forum can be chosen along with a Delaware forum. Synopsis, Section 5, Senate Bill No. 75 (Apr. 29, 2015), available at http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/87E715E89A8C4EE785257E2F00641F25?OpenDocument.
11. Cf. City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 242 (Del. Ch. 2014) (“If Delaware corporations are to expect, after Chevron, that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, then, as a matter of comity, so too should this Court enforce a Delaware corporation’s bylaw that does not designate Delaware as the exclusive forum”).
July 1st, 2015

Court of Chancery has jurisdiction. This creates a fairly clear demarcation but is narrower than some bylaws have been written. For example, many forum selection bylaws enacted to date have applied to any derivative action or any claim governed by the internal affairs doctrine. It is unclear if such bylaw language survives the statutory amendment. But as a practical matter most derivative actions and claims governed by the internal affairs doctrine implicate either fiduciary duty issues or the core jurisdiction of the Court of Chancery. Accordingly, the limitations here on forum selection bylaws are likely minor in practical effect.

The new Delaware legislation raises the question of whether some corporations that already have adopted exclusive forum bylaws should amend those bylaws to track the contours of the new section 115. The answer here is that it depends. If the existing bylaw is more limited than what is expressly permitted by statute, a corporation may well want the full protection offered by section 115. On the other hand, many corporations may find that they have bylaws that are broader than what is contemplated by section 115. There is some temptation here to leave the existing bylaw in place, assuming that, at worst, the bylaw will only be enforced to the extent of section 115. Boards may wish, however, to remove any lingering uncertainty by simply adopting a bylaw that tracks section 115 or at least clarifies that if the broader scope of any exclusive forum bylaw is struck down, the bylaw should be read as having the full scope authorized by section 115.

For corporations that have not adopted an exclusive forum bylaw, the question remains whether they should do so. While such bylaw provisions are becoming more widely accepted, they continue to be criticized by some institutional investors and, when adopted by the board of directors without a stockholder vote, they may be viewed with disfavor by the principal proxy advisory firms. Whether it makes sense for a particular board of directors to adopt an exclusive forum bylaw (or for the corporation to propose a bylaw or charter amendment providing for an exclusive forum at the corporation’s next stockholders meeting) ultimately depends on the specific situation of the corporation, including its relationship with its stockholders and other factors such as the location of the corporation’s headquarters.

About the Authors

Bonnie J Roe is a partner in the Corporate group of Cohen & Gresser LLP, where she represents publicly and privately held companies and investment funds in a variety of complex transactions. Ms. Roe has over thirty years of experience advising clients on securities law compliance, corporate

---

14. One potential effect, however, may be to limit the expansion of forum selection bylaws. For example, section 115 provides no support to a board seeking to funnel claims under federal securities laws.
governance, securities offerings, private equity and venture capital investment, and mergers and acquisitions. Her clients include U.S. and non-U.S. companies, financial institutions and investment funds. Ms. Roe has been named as one of New York’s Super Lawyers for Securities & Corporate Finance in each year since 2011.

Daniel H Tabak is a partner in the firm’s Litigation and Arbitration group. His practice focuses on securities litigation, complex commercial litigation, and bankruptcy litigation, and he has substantial experience representing major financial services companies, private equity firms, energy companies, and other multi-national corporations in high-stakes matters. Mr. Tabak is a graduate of Harvard College and earned his J.D. from Columbia Law School where he was a James Kent Scholar and a Harlan Fiske Stone Scholar. Prior to joining Cohen & Gresser, Mr. Tabak practiced with Simpson Thacher & Bartlett LLP. Mr. Tabak was named as one of New York’s Super Lawyers for Business Litigation in 2014.

Jonathan H Hofer is an associate in the firm’s Litigation and Arbitration group. His practice focuses on complex commercial litigation, bankruptcy litigation, and corporate restructuring, including the representation of companies, investors, and other parties in distressed situations. Prior to joining the firm, Mr. Hofer was an associate in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP and a law clerk to Vice Chancellor Leo E. Strine, Jr. of the Delaware Court of Chancery. He is a cum laude graduate of Harvard Law School and graduated summa cum laude from the Wharton School and the School of Arts and Sciences of the University of Pennsylvania, where he was elected Phi Beta Kappa.

About the Firm

Cohen & Gresser is an international law firm with offices in New York, Paris, and Seoul. We represent clients in complex litigation and corporate transactions throughout the world. Founded in 2002, Cohen & Gresser LLP has grown to nearly sixty lawyers in four practice areas: Litigation and Arbitration, Intellectual Property and Technology, White Collar Defense, and Corporate.

New York | Paris | Seoul

www.cohengresser.com
info@cohengresser.com
+1 212 957 7600

View C&G’s profile