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Forum Selection Provisions in Corporate Charters and Bylaws: Validity vs. Enforceability

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Forum selection clauses are common provisions in many contracts. The United States Supreme Court has recognized the presumptive validity and enforceability of forum selection clauses since as early as 1972, in *The Bremen v. Zapata Off-shore Co*. The Delaware Supreme Court has also done so repeatedly, most recently in *Ingres Corp. v. CA, Inc*. in 2010. Until recently, however, very few public companies incorporated in Delaware had included forum selection clauses in their corporate charters or bylaws, even though charters and bylaws had long been held to be contracts between corporations and their stockholders. That changed with the proliferation of multi-forum litigation by stockholders challenging merger transactions in recent years. Indeed, by some accounts, more than 90 percent of merger transactions were challenged by stockholders in 2011, more than a twofold increase from 2005, and by some accounts, almost half of the challenged transactions resulted in cases being filed in multiple jurisdictions. In 2010, in *In re Revlon, Inc. Shareholders Litig*., Vice Chancellor Laster of the Delaware Court of Chancery noted that "if boards of directors and stockholders believe that a particular forum would prove 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." Perhaps emboldened by *Revlon*, boards of directors of public companies faced with the high cost and uncertainty of multi-forum litigation began to adopt forum selection clauses as a means to reduce costly, duplicative, and often specious, lawsuits. By 2011, approximately 195 public companies had either adopted forum selection clauses in their governing instruments or proposed that stockholders adopt such provisions.

Interestingly, it was a California federal court, not the Delaware Court of Chancery, that had the first opportunity to consider the validity of an exclusive forum selection clause adopted by the board of directors of a Delaware corporation, in *Galaviz v Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011). Oracle's board of directors adopted the provision through a unilateral amendment to the company's bylaws. The California federal court did not determine whether the forum selection bylaw was unenforceable under Delaware law, but rather, held that Oracle "failed to show that its bylaw is effective under federal law." Notwithstanding, the *Galaviz* decision created uncertainty for many public companies that had adopted forum selection clauses or were considering it.

That uncertainty was quieted to some degree by *Boilermakers Local 154 Retirement Fund v. Chevron Corp*., 73 A.2d 934 (Del. Ch. 2013). The boards of directors of Chevron Corporation and FedEx Corporation amended the companies' bylaws to add exclusive forum selection provisions, which provided that suits involving the internal affairs of the companies, claims asserting fiduciary violations by the companies' directors, officers, or employees, and actions arising out of provisions of the Delaware General Corporation Law (DGCL) must be brought in Delaware state or federal court. On a motion for judgment on the pleadings, Chancellor Strine of the Delaware Court of Chancery held that the forum selection clauses had been properly adopted, because the companies' charters empowered their boards of directors to amend the bylaws, and the forum selection clauses fell within the scope of Section 109(b) of the DGCL, which expressly provides that corporate bylaws may contain any provision that relate to the corporation's business, the conduct of its affairs, and the rights and powers of its directors, officers, employees, and stockholders. In other words, the bylaws were facially valid because they "regulate where stockholders may file suit, not whether stockholders may file suit or the kind of remedy" available to the stockholders. The court also noted that stockholders have a powerful check on the boards' amendatory powers. Stockholders have the authority to repeal a forum selection bylaw and to remove directors who refuse to accept the stockholders' vote to repeal a bylaw. Moreover, stockholders retain the right

to challenge the forum selection bylaw as-applied under federal and state law, including *The Bremen and Schnell v. Chris-Craft Indus., Inc*., 285 A.2d 437 (Del. 1971). The plaintiffs in *Chevron* appealed the decision to the Delaware Supreme Court, only to dismiss the appeal voluntarily within a matter of weeks, suggesting that the plaintiffs (or more likely the plaintiffs' counsel) were concerned that the decision would be affirmed on appeal.

The latest scuffle over excusive forum selection clauses in a corporate charter occurred recently in *Edgen Group Inc. v. Genoud*, C.A. No. 9055 (Del. Ch. Nov. 5, 2013). Edgen Group Inc. (Edgen), a Delaware corporation, has a forum selection clause in its certificate of incorporation, which provides that actions alleging, among other claims, fiduciary violations by directors shall be brought in the Delaware Court of Chancery. Edgen's board of directors adopted the forum selection clause prior to the company's initial public offering, so all Edgen stockholders purchased their shares with knowledge of the clause. Notwithstanding the forum selection clause, Jason Genoud (Genoud), a Canadian citizen and a stockholder of Edgen, filed suit in Louisiana state court asserting that the directors and controlling stockholders of Edgen breached their fiduciary duties in connection with the sale of Edgen to Sumitomo Corporation of America in a transaction where all stockholders would receive $12 per share. Citing the Delaware forum selection clause, Edgen moved to dismiss the Louisiana action and countersued in the Delaware Court of Chancery to obtain an anti-suit injunction prohibiting Genoud from proceeding with the Louisiana action.

On November 5, Vice Chancellor Laster of the Delaware Court of Chancery held a telephonic hearing to address Edgen's motion to expedite the Delaware proceeding and for a temporary restraining order. In a transcript ruling, the court stated that Edgen's forum selection clause is valid, citing Chancellor Strine's recent ruling in *Chevron*. The fiduciary breaches Genoud alleged fall squarely within the scope of Edgen's forum selection clause. Thus, Edgen stated a colorable claim. And, Genoud's violation of Edgen's forum selection clause constituted irreparable harm.

However, the balancing of the equities led Vice Chancellor Laster to deny Edgen's request for a temporary restraining order. First, it was unclear that the Court of Chancery had personal jurisdiction over Genoud as a stockholder. Generally speaking, owning stock in a Delaware corporation alone is not sufficient to confer personal jurisdiction over a non-resident stockholder on a Delaware court. Whether Genoud consented to personal jurisdiction for the limited purpose of adjudicating claims within the company's exclusive forum selection clause, as Edgen argued, was open to debate because Edgen's exclusive forum selection provision did not contain an express consent to personal jurisdiction. Rather, the clause stated somewhat vaguely: "Any person or entity purchasing or otherwise acquiring any interest in the shares of capital stock of [Edgen] shall be deemed to have notice and consented to the provision of this *Article X*." According to the court, a "litigable issue" concerning personal jurisdiction existed, which affected the balancing of the equities.

Second, the court considered the "ends versus the means." More specifically, Vice Chancellor Laster acknowledged the propriety of Edgen's effort to enforce its forum selection provision, but held that the means – an anti-suit injunction – were not appropriate, citing *Carlyle Inv. Management L.L.C. v. National Industries Group* (Hldg.), 2012 WL 4847089 (Del. Ch. 2012) and *Chevron* as support. In *Carlyle*, Chancellor Strine discussed three ways to obtain enforcement of a forum selection clause: moving to dismiss the complaint in the foreign forum; obtaining a default judgment in the contractually specified forum and then seeking res judicata in the other forum on the grounds that a judgment has already been obtained; and, moving for an anti-suit injunction. Filing a motion to dismiss in the non-contractually selected forum is the least aggressive of these options and is respectful of the comity issues facing courts, as Chancellor Strine recognized in *Chevron*. In that case, Chancellor Strine contemplated that an exclusive forum selection bylaw provision would be considered by the non-Delaware court first via a motion to dismiss, not through an anti-suit injunction in Delaware. This approach permits the court in the non-contractually selected forum to consider whether application of the exclusive forum selection provision would be unreasonable under the United States Supreme Court's holdings in *The Bremen and Carnival Cruise Lines v. Shute*, 449 U.S. 585 (1991).

Third, the court considered the evolution of exclusive forum selection provisions. Those provisions have been considered presumptively valid and enforced by state and federal courts, including Delaware, for some time. However, it was not until this year, in *Nat'l Indus. GP (Hldg.) v. Carlyle Inv. Mgmt. LLC*, 67 A.3d 373 (Del. 2013), that the Delaware Supreme Court ruled that a Delaware court should grant an anti-suit injunction to enforce a forum selection provision in a *negotiated contract with signatories*. By contrast, the Delaware Supreme Court has yet to consider the propriety of issuing an anti-suit injunction to enforce a forum selection provision set forth in a corporation's charter or bylaws. Accordingly, Vice Chancellor Laster stated that an anti-suit injunction may not be the "initial tool of judicial first resort" to enforce exclusive forum selection clauses in charters and bylaws. However, the court left open the possibility that an anti-suit injunction may be appropriate, if the other mechanisms available to enforce such provisions fail for some reason. In the event it must consider granting an anti-suit injunction, the court noted that it would be helpful to understand whether other courts have issued anti-suit injunctions to enforce forum selection clauses in mass contracts involving non-direct signatories such as pre-printed tickets, credit card and cellular phone agreements, and shrink-wrap, bubble-wrap, and click-through agreements for software. Interestingly, it does not appear that other state or federal courts have had an opportunity to consider the propriety of issuing an anti-suit injunction to enforce forum selection

clauses in mass contracts involving non-direct signatories.

As it stands today, the law in Delaware on forum selection clauses is relatively clear. Exclusive forum selection clauses are presumptively valid and enforceable. A Delaware court will issue an anti-suit injunction to enforce a forum selection clause in a negotiated agreement with signatories. However, when the forum selection clause is found in a corporate charter or bylaws, the holdings in *Chevron* and *Edgen* indicate that the Court of Chancery is unlikely to grant an anti-suit injunction as a judicial remedy of first resort. Rather, the non-breaching party should move to dismiss the action in the non-contractually selected forum or obtain a default judgment in the contractually selected forum and then proceed to seek *res judicata* in the other forum on the grounds that a judgment has already been obtained in the contractually selected forum to enforce the forum selection clause. Thus, in order to gauge how successful forum selection clauses in Delaware corporate charters and bylaws are in stemming the tide of multi-forum stockholder litigation, it will ironically be necessary to wait to see whether and how the courts of states other than Delaware enforce such clauses.

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