

The Delaware Court of Chancery upholds the validity and enforceability of forum selection bylaws

In the last three years, many Delaware corporations have adopted forum selection clauses – bylaw provisions that require that certain litigation implicating a corporation's internal affairs be litigated in Delaware – in an effort to address the costs of defending against multiple and duplicative litigation in different jurisdictions over a single transaction or board decision.

In early 2012, a dozen class action lawsuits were filed in Delaware Chancery Court against Delaware corporations and their directors challenging forum selection bylaws adopted without stockholder approval. A number of corporations voluntarily removed these provisions, however, two large-cap companies (Chevron and FedEx) defended their bylaws and their cases were consolidated before Chancellor Strine.

The boards of both Chevron and FedEx had adopted bylaws providing that Delaware courts would be the sole and exclusive forum for certain litigation. The Chevron bylaw provides:

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 (iv) 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's having personal jurisdiction over the indispensable parties named as defendants. 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].

In [*Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, C.A. No. 7220-CS \(Del. Ch. June 25, 2013\)](#), Chancellor Strine found that these bylaws were valid under 8 Del. C. § 109(b), which 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." The Chancellor first rejected plaintiffs' argument that these bylaws attempt to regulate an "external" matter as opposed to an "internal" matter of corporate governance. He then went on to reject plaintiffs' argument that these bylaws involve a novel use of statutory authority, noting that (i) Delaware corporate law is not static and (ii) these bylaws are subject to controls on their misuse – to challenge as a breach of fiduciary duty if applied inequitably and to repeal by a majority vote of stockholders. The Chancellor noted that a plaintiff could still challenge the real-world application of a forum selection bylaw as an inequitable breach of fiduciary duty when there is a genuine, existing controversy in which the forum selection bylaw is being applied.

The Chancellor also rejected plaintiffs' contention that the bylaws were contractually invalid because the Chevron and FedEx boards of directors had adopted them unilaterally, without a vote of stockholders. The Chancellor wrote that "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."

The Chancellor's logic appears sound but at least on its face could apply equally to various other director-adopted bylaw provisions that are more controversial than forum selection clauses (for example, bylaws mandating arbitration of certain claims against the corporation or its directors).

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